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AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 243

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, PLAINTIFF IN ERROR,

vs.

THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 10, 1896.
CERTIORARI AND RETURN FILED OCTOBER 26, 1896.

(16,401.)

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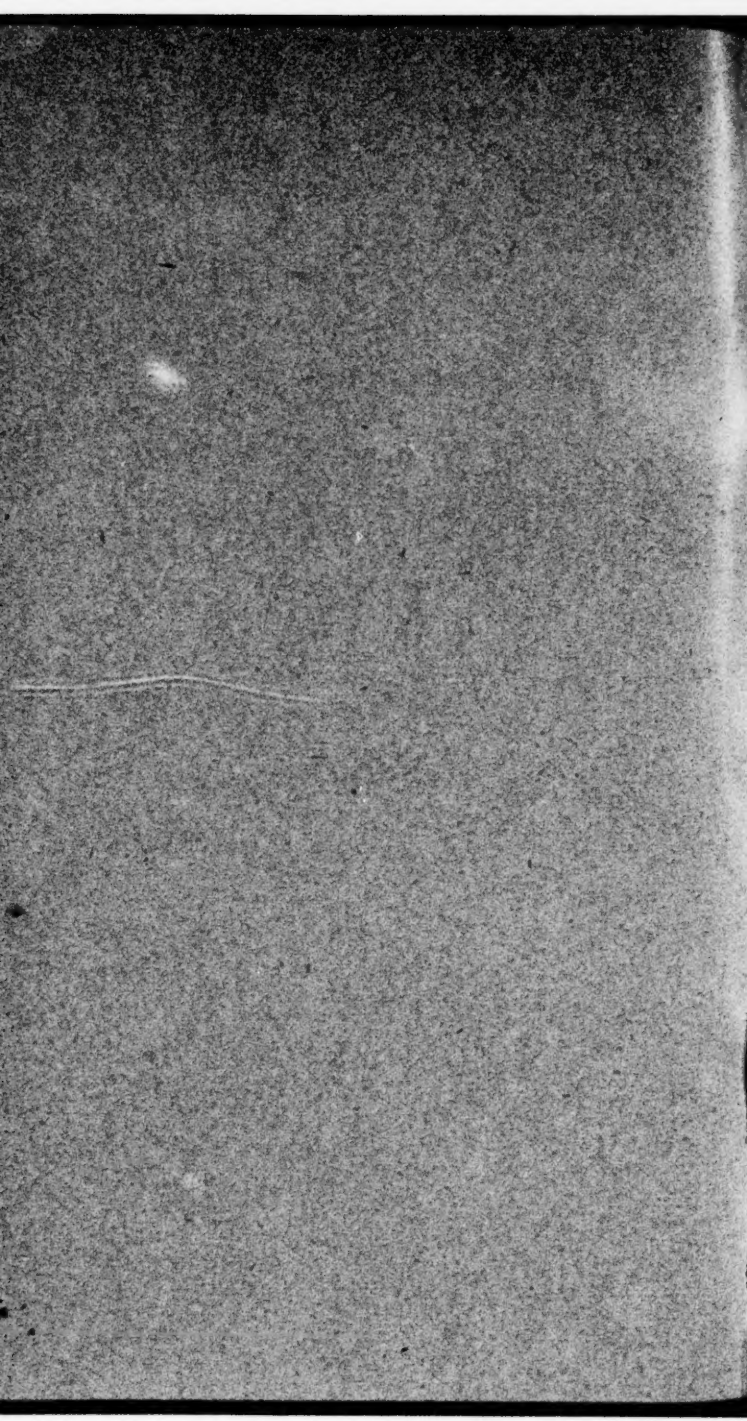

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INDEX.

	Original.	Print.
Stipulation as to printing record	*a*	1
Transcript from circuit court of the United States for the district of Kentucky, filed May 23, 1895	1	2
Caption	1	2
Petition	1	3
Copy of coupon	9	10
Process (omitted in printing)	9	—
Answer	10	11
Order filing amended and supplemental petition, that answer stand, and filing reply to answer	13	14
Amended and supplemental petition (omitted in printing)	14	—
Reply	15	14
Stipulation waiving jury	17	16
Findings of fact	17	16
Order of submission	18	17
Petition	18	17
Notice	20	19
Order of subscription	21	20
Order of January 10, 1887	22	21
Order appointing Trustee Moore	24	23
Bond of Trustee Moore	24	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 9, 1897.

THROUGH BOOB COPY

	Original.	Print.
Resignation of Trustee Moore	25	24
Order appointing new trustee	25	24
Bond of Trustee Pearson	26	25
Copy of bond (omitted in printing)	27	—
Resolution of county court of claims, June 26, 1888	30	28
Resolutions of December 13, 1888	31	29
Resolutions of May 28, 1890	32	30
Burgin agreement	33	31
Bond of indemnity to Pearson	33	31
Order to file opinion	35	33
Judgment	35	33
Order as to bill of exceptions, &c. (omitted in printing)	36	—
Opinion	36	34
Bill of exceptions	43	40
Petition for writ of error	44	41
Bond on writ of error (omitted in printing)	45	—
Clerk's certificate (" ")	46	—
Writ of error (" ")	46	—
Waiver of citation (" ")	47	—
Order passing case (" ")	47	—
Minute entry of hearing and submission (omitted in printing)	48	—
Judgment	48	42
Opinion	49	43
Orders extending time in which to file petition for rehearing (omitted in printing)	68	—
Petition for rehearing (omitted in printing)	69	—
Order denying petition for rehearing (omitted in printing)	86	—
Clerk's certificate (omitted in printing)	86	—
Writ of certiorari	88	62
Return to writ of certiorari	89	62

BLEED.

a In the Supreme Court of the United States, October Term, 1897.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error,
versus
THE PROVIDENT LIFE AND TRUST CO. OF PHILADELPHIA, Defendant in Error.
No. 243.

On writ of certiorari to the United States circuit court of appeals for the sixth circuit.

Stipulation.

In the reprinting of the record certified from the U. S. circuit court of appeals for the sixth circuit, it is stipulated by the parties as follows:

I.

The clerk of the Supreme Court may omit—

(1.) The verification of petition (p. 9) and of answer (p. 13).

(2.) The process and return thereon (pp. 9, 10).

(3.) The amended and supplemental petition (pp. 14, 15), substituting therefor this statement:

"The amended and supplemental petition, setting up coupons maturing during the pendency of the suit, is omitted per stipulation."

(4.) The form of the bonds sued on (pp. 27, 28), substituting therefor this statement:

"Omitted per stipulation, as it is copied in full in the petition, *supra*."

(5.) The order filing the bill of exceptions, writ of error,
b and assignment of errors (p. 36).

(6.) The appeal bond, clerk's certificate, writ of error, orders passing case and submitting case (pp. 45–48), substituting therefor the statement on p. 46 of attached record.

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(7.) Orders extending time for filing a petition for rehearing, the petition for a rehearing, and the order overruling the same (pp. 68–83), substituting therefor this statement:

"A petition for a rehearing was duly filed, which was denied, on May 25th, 1896, without an opinion."

(8.) The clerk's certificate (p. 83).

II.

That the record may be paragraphed, spaced, quotation-marks inserted, and a short descriptive heading inserted at the beginning of the various documents, as appears by the marked copy of the record hereto attached.

THE PROVIDENT LIFE AND TRUST CO. OF PHILADELPHIA,
By THOMAS W. BULLITT, *Counsel.*
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
By ALEX. P. HUMPHREY, *Counsel.*

June 21st, 1897.

c [Endorsed:] No. —. In the United States Supreme Court. County of Mercer, pl'tiff in error, *versus* Provident Life & Trust Co., defendant in error. Stipulation of counsel. Bullitt & Sheild, counsel for plaintiff in error, Fifth and Main Sts., Louisville, Ky.

1 *Transcript of Record.*

Filed in the United States circuit court of appeals for the sixth circuit May 23, 1895.

Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal Court hall, in the city of Louisville, on Monday, February 18th, 1895.

Present: Honorable John W. Barr, sitting as circuit judge.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA
vs.
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY. } No. 6225. Petition.

Be it remembered that heretofore, to wit, on the 3rd day of November, 1892, came the plaintiff, by its attorneys, Messrs. Bullitt &

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Shield, and filed in the clerk's office of our said court its petition against the above-named defendant.

The petition above referred to is in the words and figures as follows, to wit:

United States Circuit Court, District of Kentucky.

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Defendant.
} Petition.

The plaintiff, The Provident Life & Trust Company of Philadelphia, states that it is a corporation created, organized and existing under the laws of the State of Pennsylvania; the defendant, The County of Mercer, is a municipal corporation created, organized and existing under the laws of the State of Kentucky, and is a citizen of the said State, and each of said parties has corporate capacity to contract and be contracted with and to sue.

Plaintiff further states that the Louisville Southern Railroad Company is a corporation likewise created, organized and existing under the laws of the State of Kentucky, possessing by its
2 charter the power and authority to construct its railroad, hereinafter mentioned, extending from the city of Louisville to and through the said county of Mercer, as will more fully appear by reference to an act of the legislature of Kentucky, entitled "An act to incorporate the Louisville, Harrodsburg & Virginia Railroad Company," approved March 9th, 1868, and by another act amendatory thereof, entitled "An act to amend an act entitled 'An act to incorporate the Louisville, Harrodsburg & Virginia Railroad Company,' approved March 9th, 1868, and to change the name of said company to that of the Louisville Southern Railroad Company," approved April 28th, 1884, and other acts amendatory of said original act and of said original and amendatory act.

By another act of the said legislature of the State of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, it was provided that the county of Mercer might subscribe to the capital stock of the Louisville Southern Railroad Company as therein provided, and might pay therefor in the negotiable coupon bonds of the said county, payable not more than thirty years after

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date, bearing interest at the rate of not exceeding six per cent. per annum, payable semi-annually, to be payable at a place designated therein; said act providing that whenever application should be made to the judge of the county court of the said county by a petition of twenty-five resident tax-payers therein requesting that the question of subscribing to the capital stock of said railroad company upon the terms and conditions set forth in said petition be submitted to a vote of the legal voters of said county, it should be the duty of the county court to order an election to be held in said county on a day named therein to ascertain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice of such election to be published in said county in a newspaper published therein for ten days, and to be posted at the court-house door in said county, and at such other public places therein as said judge by order might direct, and that at such election votes should be received "for the railroad subscription" and "against the railroad subscription;" officers of said election to be appointed and to hold the same and make return thereof to the county judge in the manner provided; that as soon as might be after said election the county judge should determine if a majority of the legal votes cast at said election were in favor of such subscription, and if so he should thereupon enter an order subscribing, on behalf of said county of

3 Mercer, to the capital stock of said railroad company in accordance with the terms of the proposition voted on, and he should thereupon cause to be prepared and should execute negotiable coupon bonds of said county, which should be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, the coupons to be signed by the clerk.

Said act further provided that said bonds should not be binding nor valid obligations until the railway of said railway company should have been so completed through said county of Mercer that a train of cars should have passed over the same, at which time said negotiable coupon bonds should be delivered to said railroad company in payment of the subscription of said county, and that the county should thereupon be entitled to receive certificates for the stock subscribed for by it. Said act further provided that the county judge of said county should order that said bonds should be deposited with a trustee or trust company to be held in escrow to deliver to said railroad company when it should become entitled to the same by the construction of its railroad through said county; provided, however, that said trust company or trustee should, before receiving said bonds, give bond with good surety approved by the county

judge for the faithful performance of his or its duty in the premises, and provided, further, that no such subscription should be binding unless said railroad should pass to or through the corporate limits of the town of Harrodsburg. Said act further provided that an annual tax sufficient to pay the interest on said bonds, and the principal when it should become due, should be levied, collected, and paid out by the officers of said county as provided in the case of other county taxes, and that said act should take effect from and after its passage.

Plaintiff further states that pursuant to the provisions of said act the application therein mentioned was, on or about the 18th day of November, 1886, made to the judge of the Mercer county court, by petition of 25 tax-payers resident therein, setting forth the terms and conditions of a proposed subscription by said county to the capital stock of said railroad company, and requesting that the question of such subscription should be submitted to a vote of the legal voters of said county, viz:

Said petition in substance proposed a subscription pursuant to the said act of May 15th, 1885, by the county of Mercer to the capital stock of said Louisville Southern Railroad Company to the amount of one hundred and twenty-five thousand dollars ($125,000), payable in the negotiable coupon bonds of the said county, which bonds
4 should be payable, principal and interest, at the Louisville Banking Company, in Louisville, Kentucky, the principal payable thirty years after date and the interest at the rate of five per cent. per annum, payable semi-annually, subject to the conditions and provisions specified in said act.

The proposition further provided for an agreement to be made by said railroad company that after the construction of its railroad through Mercer county, as provided in said act, it would construct certain buildings near Harrodsburg, and required that the trustee should retain twenty thousand ($20,000) dollars of the said county bonds until said buildings should have been erected, and as a security for their erection; but it was expressly provided that one hundred and five thousand ($105,000) dollars of said bonds should be delivered to the railroad company whenever its railroad should have been constructed through the county of Mercer, as provided in said act.

A copy of said petition will be filed herewith as part hereof, marked Exhibit "A."

On the same day, to wit, November 18th, 1886, the county judge of Mercer county did order an election to be held in said county on

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the day named therein, to wit, on the 4th day of December, 1886, to ascertain the sense of the legal voters thereof upon the question of making such subscription, and said county judge did cause notice of said election to be published in said county in a newspaper published therein, for more than ten days, and caused the same to be posted at the court-house door in said county and at the other public places named in said order. A copy of the said order will be filed herewith as part hereof, marked Exhibit "B."

Officers were duly appointed to hold and did hold said election at the time and in the manner required by said act and by said order, and made due and lawful return thereof to that said county judge in the manner provided in ordinary county elections.

At the election so held a majority of the legal votes cast were in favor of said subscription and were so ascertained and determined to have been cast by said county judge, and thereupon said county judge did enter an order subscribing in behalf of the county of Mercer to the capital stock of the said Louisville Southern in the amount of one hundred and twenty-five thousand dollars, payable in the negotiable coupon bonds of said county, in accordance with the terms of the proposition so voted upon, and said county judge did thereupon cause to be prepared and did execute 125 of the
5 negotiable coupon bonds of said county, bearing date of January 10th, 1887, each of the denomination of $1,000, payable thirty years after date, bearing interest at the rate of five per cent. per annum, payable semi-annually, said bonds and interest being made payable at the Louisville Banking Co., in the city of Louisville, Kentucky. John W. Hughes was at the time of said election and of the execution of said bonds and is still the county judge of Mercer county, and Ben. C. Allin was at the time aforesaid and still is clerk of the county court of said county, and each of said bonds was, as required by the act aforesaid, signed by said Hughes as county judge and attested by said Allin as county clerk, with his official seal attached thereto, and the coupons representing the semi-annual payment of interest therein were signed by said clerk. Said bonds are numbered serially from 1 to 125 (both inclusive), and with the exception of the numbers thereof in words and figures as follows, to wit:

BLEED.

UNITED STATES OF AMERICA.

$1,000. No. 105.

Louisville Southern Railroad Aid Bond.

County of Mercer,

State of Kentucky.

The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of one thousand dollars ($1,000) on or before the tenth day of January, A. D. one thousand nine hundred and seventeen (1917), at the Louisville Banking Company, in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent. per annum, payable semi-annually at said bank on the tenth days of July and January, after date respectively, in each year on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor and numbered consecutively from one to one hundred and twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15, 1886, and pursuant to an order entered by the county judge of said county, in conformity with said act, subscribing in behalf of said county for the capital stock of the
6 Louisville Southern Railroad Company in the sum of one hundred and twenty-five thousand dollars ($125,000), which order was entered of record in said court on January tenth, A. D. eighteen hundred and eighty-seven (1887). If the County of Mercer shall determine to pay any part of said series of bonds before the end of thirty (30) years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz: in Harrodsburg and Louisville, Ky., and New York city, stating the time when such bonds will be paid, and such call of bonds shall be made consecutively, and not more than twenty-five thousand dollars of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

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In witness whereof, the County of Mercer by Jno. W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county, with his official seal affixed hereto, and the interest coupons attached hereto have been signed by the said clerk. Done on the tenth day of January, A. D. one thousand and eight hundred and eighty-seven.

[SEAL.] THE COUNTY OF MERCER,
By JNO. W. HUGHES, *County Judge.*

Attest: BEN. C. ALLIN, *Clerk.*

Attached to each of said bonds as originally executed there were sixty coupons representing the interest payable on the 10th days of January and July in each year respectively, and except as to the dates of maturity and the numbers of the bonds said coupons are all in form and tenor as follows, to wit:

"On the — day of ——, 18—, the County of Mercer, State of Kentucky, will pay to the bearer at the Louisville Banking Company, in the city of Louisvile, Ky., twenty-five dollars, being the semi-annual interest on the Louisville Southern aid bond No. —.

(Signed) BEN. C. ALLIN, *Clerk.*"

The said county judge caused said bonds to be deposited with one Isaac L. Pearson, as trustee, to be held in escrow and deliv-
7 ered to said Louisville Southern Railroad Company when it should become entitled to the same by the construction of its said railroad through the county of Mercer and into or through the corporate limits of the town of Harrodsburg in Mercer county; and before receiving said bonds said trustee gave bond with good surety approved by said county judge for the faithful performance of his duty.

Plaintiff further states that afterwards and within the time provided for by said act and by the terms of the proposition submitted and voted upon at said election as hereinbefore set forth the Louisville Southern Railroad Company did construct and so complete its said railroad through said county of Mercer that a train of cars could pass and did pass over the same, and did construct said railroad to and through the corporate limits of the town of Harrodsburg, and thereupon demanded a delivery of said bonds to the amount of $105,000.

Plaintiff further states that thereafter the said trustee, having been called upon and requested by said Louisville Southern Railroad Com-

pany to deliver to it or its assigns the said bonds to the amount of $105,000 par value thereof, notified the county judge of said county and notified the county court as composed of said judge and the magistrate of said county of the demand which had been made upon him for a delivery of said bonds and of his expectation and purpose to deliver the same unless directed or requested by said county court or county judge to withhold the delivery thereof. At the time of said notification the said county judge and the said county court and all its members had full knowledge and notice of the extent to which and the direction in which said railroad had been constructed into and through said county of Mercer. Neither the said county judge nor said county court made objection to said delivery, but assented thereto, and received for and on behalf of said county, and said county now holds the certificates for 1,050 shares of the capital stock of said Louisville Southern Railroad Company, being the same for which it had subscribed and for which the said bonds were deliverable in payment as aforesaid; and thereupon and thereafter the said trustee did deliver to the Louisville Southern Railroad Company or its assigns said bonds to the amount of $105,000 par value thereof, to wit: the said bonds numbered serially from one to one hundred and five (both inclusive), said delivery having been made about the month of August, 1888.

8 Plaintiff further states that thereafter, without knowledge or notice that there was, or that the county of Mercer claimed that there was any defect or infirmity in the said bonds or the coupons attached thereto, or in the title of the Louisville Southern Railroad Company or its assigns to said bonds and coupons, this plaintiff did in the regular course of business and for a full and valuable consideration purchase in the open market and from persons other than the Louisville Southern Railroad Company, being then the holders and owners thereof, one hundred of said bonds with the coupons thereto annexed, to wit: said bonds numbered serially from 6 to 105 (inclusive), and is now the holder and owner of said bonds and the coupons annexed thereto.

Plaintiff further states that the said county did heretofore for and during several years levy upon the people of said county a tax for the payment of the interest coupons on the whole of said one hundred and five thousand dollars of bonds, said tax having been so levied and collected for the years 1889, 1890, 1891 and January of 1892, and out of the tax so collected said county paid all of the coupons upon said $105,000 of bonds falling due after July 10th, 1888, to wit: coupons falling due on the 10th day of January and the 10th

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day of July, 1889; the 10th day of January and the 10th day of July, 1890; the 10th day of January and the 10th day of July, 1891; and the 10th day of January, 1892; but said county has failed and refused to pay the coupons on any of said bonds falling due on the 10th day of July, 1892, or any of them.

Plaintiff states that it is the lawful holder and owner of 100 of the coupons on said bonds falling due July 10th, 1892, being the coupons attached to said bonds respectively numbered serially from 6 to 105 (inclusive), and that by each of the said 100 coupons so held and owned by complainant said County of Mercer promised that on the 10th day of July, 1892, it will pay to the bearer at the Louisville Banking Company, in the city of Louisville, Ky., twenty-five dollars, being the semi-annual interest on the Louisville Southern Railroad aid bond to which said coupon was attached.

Said 100 coupons are filed herewith as part hereof, marked Exhibit "C."

By reason of the possession and ownership of said coupons said County of Mercer has become indebted to and has promised to pay to this plaintiff the amount of said several coupons, to wit: the sum of twenty-five hundred ($2,500) dollars, with interest thereon from the 10th day of July, 1892. Plaintiff caused said coupons to be
9 presented for payment and payment thereof demanded at said Louisville Banking Company on the 10th day of July, 1892, and payment thereof was refused; said county has failed and refused to pay the same or any part thereof, and the said entire sum is now due and unpaid.

Wherefore plaintiff prays for judgment against said County of Mercer in said sum of twenty-five hundred dollars ($2,500), with interest thereon from said date until paid, and prays for all proper relief.

BULLITT & SHIELD,
Att'ys for Plaintiff.

One of the said 100 coupons filed with the petition and marked "Exhibit C" is as follows, and the remainder are identical therewith, except as to number:

"On the 10th day of July, 1893, the County of Mercer, State of Kentucky, will pay to the bearer at the Louisville Banking Co., in the city of Louisville, Ky., twenty-five dollars, being semi-annual interest on Louisville Southern Railroad aid bond.

No. 6.

$25.00. BEN. C. ALLIN, *Clerk.*"

10 And at a term of our said court held for its October term, 1893, to wit: on November 2, 1893, came the defendant by its attorneys and filed its answer herein.

The answer referred to is as follows:

Circuit Court of the United States, District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Complainant,
vs.
COUNTY OF MERCER, STATE OF KENTUCKY, Defendant.
} Answer.

The defendant, The County of Mercer, in answer to the petition herein, says that as to various acts of the legislature of Kentucky referred to in the petition, and the contents thereof, it refers to said acts themselves. It also refers to the exhibits filed with the plaintiff's petition as correcting the allegations made in the petition in reference to their contents. It denies that officers of election did hold the said election in the manner and time required by the act, or by the said order. It denies that at the election so held a

11 majority of the legal votes cast were in favor of said subscription. It denies that afterwards, or within the time provided for by said act, or by the terms of the proposition submitted or voted upon at said election, or at all, the said Louisville Southern Railroad Company did construct or so complete its said railroad through said county of Mercer that a train of cars could or did pass over the same. It denies that either the said county judge of county court assented to the delivery of said 105 bonds or any part of them. It denies that the plaintiff, in the regular course of business, or for a full and valuable consideration did purchase in the open market one hundred or any of said bonds, without knowledge or notice that there was, or that the County of Mercer claimed that there was a defect or infirmity in the said bonds or in the title of the Louisville Southern Railroad Company or its assigns thereto. It denies that the plaintiff is the lawful holder and owner of one hundred or any coupons on said bonds, falling due July 10, 1892, or that this defendant has become or is indebted or has promised to pay to the plaintiff the amount of said several coupons or any of them.

Further answering, this defendant says that it was expressly provided in the said act under which the said bonds purport to have been issued that the said bonds shall not be binding or valid obligations until the railway of the said company, to wit, the Louisville

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Southern Railroad Company, shall have been so completed through such county, to wit, Mercer county, that a train of cars shall have passed over the same; and this defendant says that the railway of the said company has never been completed through such county at all, nor been so completed that a train of cars could pass over the same, and no train of cars has passed over the same, and that the said bonds and all of the coupons attached thereto, including those sued on, are void and of no effect.

Defendant further says that no election was ever held in Mercer county in accordance with the petition filed as set forth in the petition, nor in accordance with the notice given as alleged in the petition, nor in accordance with the act of *of* the legislature referred to in the petition, in this, that on and prior to the said election ordered to be held by the county judge of Mercer county, as set forth in the petition, the Louisville Southern Railroad Company made and entered into an agreement in writing with the town of Burgin, a duly corporated village situated within the limits of Mercer county, and with the chairman of the board of trustees of said town representing the people and tax-payers of said Burgin district, the

12 same being a part of Mercer county, and the voters thereof being a part and parcel of the legally qualified voters of Mercer, and to whom the proposition embodied and set forth in the petition, order, and notice was to be submitted; which agreement is in words and figures as follows, to wit:

"It is hereby agreed with the town of Burgin and its trustees, upon the part of the Louisville Southern Railroad Company, that if the present proposed subscription by Mercer county is carried, the said Louisville Southern Railroad Company will, by the time the said Louisville Southern railroad is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin to a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not, then the Louisville Southern guarantees that said Burgin shall be exempt from taxes from and on account of said subscription—that is, the Louisville Southern will pay the taxes of said Burgin district."

Which said agreement was signed by the Louisville Southern Railroad Company, by J. W. Stine, its president, and by the Southern Construction Company, by Bennett H. Young, its president, and was dated December 1, 1886, and delivered to the town of Burgin on or about that date; that the said pretended election was held on the 4th day of December, 1886, and that in the notice which was pub-

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lished on the said election no reference was made to this agreement with the town of Burgin, so that when said election was held upon the 4th day of December, 1886, the voters of Mercer county did not have the same proposition submitted to them, nor were they given notice of what were the real terms upon which the subscription was to be voted; and the defendant further says that the plaintiff at the time it purchased the said bonds, and each and every one of the owners thereof, through whose hands they passed into the hands of the plaintiff, had notice of the fact that this agreement had been so made by the said Louisville Southern Railroad Company with the town of Burgin prior to the date of the said election, and that notice of the same had not been given in the time and manner required by law to the voters of Mercer county, whereby this defendant says that the said election was not a legal or valid election, and that the proposition of subscription was never lawfully voted for or carried by the qualified voters of the county of Mercer.

Further answering, the defendant says that the said Isaac
13 Pearson, trustee, mentioned in the petition, was in possession of the whole $125,000 of the bonds of this defendant, and on August 6, 1888, in order to procure the said Isaac Pearson to deliver over 105 of said bonds to the Louisville Southern Railroad Company, the said Louisville Southern Railroad Company did enter into a contract of indemnity with the said Isaac Pearson, by which the said Louisville Southern Railroad Company, as principal, with Bennett H. Young, R. S. Veech, V. D. Price, W. H. McBrayer, and W. T. Grant, as sureties, agreed to indemnify and save harmless the said Pearson and his sureties from any damage, loss, or costs, ordinary or extraordinary, that the said Pearson and his sureties or any of them might sustain or might be held or made liable for on account of the delivery of said bonds; and but for such indemnity the said Isaac Pearson, trustee, would not have delivered the said 105 bonds to the Louisville Southern Railroad Company. Defendant says that the delivery of the said bonds so procured as aforesaid from the said Isaac Pearson, trustee, made the same of no force and effect, and that the said bonds and the coupons cut therefrom sued on herein by the plaintiff are not the act and deed of this defendant, and have never been lawfully delivered as such.

Wherefore the defendant prays that this suit may be dismissed, for its costs, and all proper relief.

JOHN W. HUGHES,
P. J. M. C. C.

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And on another day of said term of said court, to wit, on the 3rd day of February, A. D. 1894, came the plaintiff and defendant, by their respective counsel herein, and thereupon plaintiff filed herein its amended and supplemental petition, and by consent of parties it is ordered that the answer heretofore filed by defendant to the original petition shall be esteemed and treated as likewise an answer to said amended and supplemental petition.

And then plaintiff filed its reply to said answer of the defendant, and by consent of parties it is ordered that the affirmative allegations therein are controverted of record.

14 (The amended and supplemental petition, setting up coupons that matured during the pendency of the suit, is omitted per stipulation.)

15 The reply above referred to is as follows, to wit:

United States Circuit Court. District of Kentucky.

PROVIDENT LIFE AND TRUST COMPANY, Complainant,
vs.
COUNTY OF MERCER, Defendant.
} Plaintiff's Reply.

Plaintiff denies that the railway of the Louisville Southern Railroad Company has not been completed through the county of Mercer, or that it has not been so completed that a train of cars could not pass over same, and denies that no train of cars has passed over said railroad so completed as aforesaid, and denies that the bonds of Mercer county and the coupons thereto attached, mentioned in the petition, are or that any of them are void or of no effect.

Plaintiff denies that an election was not held in Mercer county in accordance with the petition, notice, an l act of the legislature mentioned and set forth in the plaintiff's petition herein.

Plaintiff denies that on or prior to the election ordered to be held by the judge of Mercer county, as set forth in its petition herein, the Louisville Southern Railroad Company made or entered into the agreement in writing with the town of Burgin, the village in the answer mentioned, or with the chairman and board of trustees of said town, which is set forth in the answer.

Plaintiff has no knowledge or information sufficient to enable it to form a belief as to whether or not a writing in form or
16 substance, as set forth in said answer, was or was not signed with the name of the Louisville Southern Railroad Co., by

J. W. Stine, its president, or by the Southern Contract Company, by Bennett H. Young, its president, or whether or not such a paper was or was not, on December 1, 1886, or at any time, delivered by either or both of said persons to said town of Burgin; but plaintiff denies that *if* such writing, if so signed and delivered, was either signed or delivered by or with the authority, knowledge, or consent of either said Louisville Southern Railroad Co. or said Southern Contract Company, and denies that same was or is the act or deed of either of said companies.

Plaintiff denies that at the time it purchased said bonds or at any time, until the filing of the answer herein, it had notice or knowledge that said agreement or that any agreement had been made by said Louisville Southern Railroad Company with the town of Burgin, or that notice of such agreement had not been given at the time and in the manner required by law to the voters of Mercer county, and denies that each or any of the owners of said bonds through whose hands they passed into the hands of plaintiff had such notice or knowledge.

Plaintiff denies that by reason of said alleged agreement or otherwise said election was not a valid or legal election or that the proposition of subscription was not lawfully voted for or carried by the qualified voters of Mercer county.

Plaintiff has no knowledge or information sufficient to enable it to form a belief as to whether or not on August 6th, 1888, or at any time, in order to procure Isaac Pearson to obtain 105 or any of said bonds of Mercer county the said Louisville Southern Railroad Company entered into a contract of indemnity with said Isaac Pearson by which said Louisville Southern Railroad Company, as principal, with Bennett H. Young and others, as surety, agreed to indemnify or save harmless said Isaac Pearson and his sureties from any damage, loss, or costs which said Pearson and his sureties might sustain or be held or made liable for on account of a delivery of said bonds, nor as to whether or not, but for such indemnity, said Pearson would not have delivered said bonds; but plaintiff says that if such a contract of indemnity was made or entered into, the fact was not known to this plaintiff when it purchased and paid for said bonds, nor was it informed thereof until the answer herein was filed. Plaintiff denies that the delivery of said bonds (even if procured, as alleged, from said Pearson, trustee) was of no force or effect, or that
17 said bonds and coupons are not the act and deed of the defendant, The County of Mercer, or may not have been delivered as such.

BULLITT & SHIELDS,
For Plaintiff.

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And on another day of said term of said court, to wit, Thursday, the 12th day of April, 1894, came the parties, by their counsel, and filed their written agreement within, which is as follows:

"It is agreed between the parties hereto and stipulated that the issues of fact in the above-entitled cause pending in this court may be tried and determined by the court without the intervention of a jury, the parties hereto waiving a jury.

March 30th, 1894.

PROVIDENT LIFE & TRUST COMPANY,
By BULLITT & SHIELD.
THE COUNTY OF MERCER,
By HUMPHREY & DAVIE, *Att'ys.*"

And at another term of our said court, held for its February term, to wit, on Tuesday, April 30th, 1895.

And now upon this day came the parties, by counsel, and the court delivered its special finding of fact herein, which is ordered to be spread upon the record, and is as follows:

FINDINGS OF FACT.

"The attorneys of record of the parties having duly filed herein with the clerk a stipulation in writing waiving a jury, in accordance with section 649 of Revised Statutes of the United States, the issues of fact herein were tried by the court, which now makes the following special finding, which is now ordered spread upon the record.

The county court of Mercer county was petitioned on the 18th day of November, 1886, by more than twenty-five resident tax-payers of said county, to submit to the vote of the legal voters of said county the question of whether or not said county should subscribe one hundred and twenty-five thousand dollars in the capital stock of the Louisville Southern Railroad Company upon certain terms and conditions stated in said petition, said petition being, except as to the names of the signers, fully set forth in the order of November 18th, 1886, hereinafter mentioned.

This petition was on that day (November 18) filed by the said county court, and an order was entered submitting said ques-
18 tion to the legal voters of said county and directing the vote to be taken on the 4th day of December, 1886.

This order is as follows:

BLEED.

Order of Submission.

"A petition of more than twenty-five tax-payers of this said county having this day been presented to said county court, which said tax-payers are residents of said county, and which said petition requests that the question of subscription to the capital stock of the Louisville Southern Railway Company upon the terms and conditions set forth in said petition shall be submitted to a vote of the legal voters of said county, and the said court being advised, it is ordered that the same be filed, which is done; and thereupon the said court made the following

ORDER,

To wit:

"Mercer County Court.

On this day application was made to the judge of the county court of Mercer county by the petition of more than twenty-five tax-payers resident in said county, requesting that the question of subscribing to the capital stock of the Louisville Southern Railroad Company upon the terms and conditions set forth in said petition be submitted to a vote of the legal voters of said county: which petition is in words and figures as follows, to wit:

"To the judge of the county court of Mercer county, Kentucky:

"The undersigned tax-payers, residing in the county of Mercer, request that the question of subscribing to the capital stock of the Louisville Southern Railroad Company by the said county be submitted to a vote of the legal voters of such county, under and in accordance with an act of the General Assembly of the Commonwealth of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company, approved May 15th, 1886; such subscription to be upon the following terms and conditions: That the said county shall subscribe to the capital stock of the said Louisville Southern Railroad Company the sum of $125,000, and the said subscription shall be paid in the negotiable coupon bonds of the said county, payable on or before thirty years after date, and bearing interest at the rate of five per cent. per annum, payable semi-annually, and principal and interest to be payable at the Louisville Banking Company, in the city of Louisville, Ky.: Provided, however, that if the county of Mercer shall determine to pay any part of said bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made

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in a newspaper published in each of the following places, to
19 wit: Harrodsburg and Louisville, Kentucky, and New York city, stating the time when such bonds will be paid. Said call of bonds shall be made consecutively according to their numbers, the lower numbers being called first, and not more than $25,000 of bonds shall be called in any one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount named in said call. But such bonds shall not be binding or valid obligations until the railroad of the said company shall have been so completed through such county that a train of cars shall have passed over the same, nor shall such subscription be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg to a connection with the Southwestern railway at its present depot in Harrodsburg; nor shall said bonds be delivered until the said railroad company shall have constructed in Harrodsburg or within one-fourth mile thereof a roundhouse, with not less than ten stalls, and shall have entered into an agreement in writing with the county judge of Mercer county, for the benefit of said county, to locate in Harrodsburg or within one-fourth mile thereof and within one year thereafter to construct and operate permanently there its terminal or divisional machine and repair shops, and such other shops or structures as may be necessary or convenient to the operation thereof; such agreement to be executed by the proper officers of said railroad company, accompanied by a certified copy of the resolution or proceedings of the stockholders of said company authorizing such agreement, and $20,000 of said county bonds shall be retained in the hands of the trustee or trust company, hereinafter named, as additional security for the performance of said agreement by said railroad company, and shall not be delivered to it until it shall have constructed the machine and repair shops and other structures mentioned in and contemplated by the aforesaid agreement. And the said company further agrees that should it fail to comply with said agreement that it will refund the bonds delivered or the value thereof.

"The Louisville Southern Railroad Company shall comply with the conditions of the subscription herein contemplated within five years from the time any subscription is made, else said subscription to be void and bonds cancelled.

"If a majority of the legal votes cast at such election shall be in favor of the subscription herein proposed, the said bonds shall
20 be executed and deposited with a trustee or trust company designated by the county judge, and shall be held in escrow

by said trustee or trust company and delivered to said railroad company in payment of said subscription when and as it shall become entitled to the same by the construction of its road through the county of Mercer, and by a compliance with the other conditions of the subscription as herein set forth. But before such delivery all past-due coupons attached to said bonds shall be clipped therefrom and destroyed by said trustee or trust company in the presence of the county judge.

"The trust company or trustee designated as a depositary of the bonds by the county judge shall, before receiving same, give bond, with good security approved by the county judge, for the faithful performance of his duty in the premises. As bonds are delivered to the railroad company, certificates for the capital stock of the Louisville Southern Railroad Company subscribed shall be delivered to the county judge for the use and benefit of Mercer county.

"Respectfully submitted."

"And thereupon it was and is hereby ordered that an election be held in the said county of Mercer on the 4th day of December, 1886, to ascertain the sense of the legal voters of said county upon the question of making the subscription as mentioned and set forth in said petition.

"It is further ordered that said notice of such election shall be published in the Harrodsburg Democrat, a paper published in said county, not less than ten days before said election, and that said notice be likewise posted at the court-house door in said county, and at the following additional public places therein, to wit: Burgin, Nevada, Cornishville, Bohon, Duncan, Dugansville, Salvisa and McAfee, Dixville, and at the Baton Rouge bridge. Said election to be held in manner and form as prescribed by an act of the General Assembly of the Commonwealth of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company, approved 15th May, 1886, being the same act mentioned in said petition. It is further ordered that the notice aforesaid shall be substantially in form as follows:

"*Notice.*

"To the legal voters of the county of Mercer:

Notice is hereby given to the legal voters of said Mercer county that on the 4th day of December, 1886, an election will be held in said county to ascertain the sense of the legal voters thereof
21 upon the question of making a subscription by said county

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to the capital stock of the Louisville Southern Railroad Company to the amount of $125,000.00, par value thereof, payable in the negotiable coupon bonds of the county upon the terms and conditions set forth in the petition of tax-payers hereinafter mentioned. Said election will be held pursuant to an act of the General Assembly of the Commonwealth of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railway Company,' approved 15th of May, 1886, and pursuant to the following order this day made. (Order as above is copied.)"

I find that on December 4th, 1886, an election was held under said order, and that a majority of the legal voters voting voted for the county of Mercer to make said subscription upon the terms and conditions mentioned in the order submitting same, and that fact was ascertained and declared by the county court of Mercer county in an order entered January 10, 1887, and that said county subscribed $125,000 in the capital stock of the Louisville Southern Railroad Company upon the terms and conditions of said submission.

The order is as follows:

Order of Subscription.

January 8, 1887.—"This day came the Louisville Southern Railroad Company and by their attorney submitted to the court paper X, and ask that it be entered upon the record as an order of the court; and the court to be advised took time and adjourned court until Monday next."

January 10, 1887.—"In the matter of the subscription by the county of Mercer to the capital stock of the Louisville Southern Railroad Company. Whereas, on the 18th day of November, 1886, an order was made by the county judge of the county of Mercer, which order was entered on said day on the records of the Mercer county court, which order is in words and figures as follows, viz: 'A petition of more than twenty-five tax-payers of this said county having this day presented to said county court, which said tax-payers are residents of said county, and which said petition requests that the question of subscription to the capital stock of the Louisville Southern Railway Company upon the terms and conditions set forth in said petition shall be submitted to a vote of the legal voters of said county; and the said court being advised, it is ordered that the same be filed; which is done; and thereupon the said court made the following order, to wit:' (Here is repeated, word for word, the order entered Nov. 18th, 1886.)

BLEED.

"And whereas pursuant to said order the said county judge
22 did cause notice of said election to be published in the Harrodsburg Democrat (a paper published in the county of Mercer), more than ten days before the 4th of December, 1886, and did likewise cause said notice to be posted at the court-house door in said county, and at the following additional public places therein, viz: Burgin, Nevada, Cornishville, Bohon, Duncan, Dugansville, Salvisa, and McAfee, Dixville, and Baton Rouge bridge; which notice so published and posted as aforesaid is in words and figures as follows, viz:

Notice.

(Here is repeated, word for word, notice contained in the order Nov. 18th, 1886.)

"And whereas the election ordered aforesaid was duly held pursuant to said order, in the county of Mercer, on the 4th day of December, 1886, and the returns thereof have been duly and legally made to and examined and compared by the Hon. John W. Hughes, judge of the county court of Mercer county, in the manner provided in the act authorizing said subscription hereinabove mentioned: Now, therefore, it has been and is now ascertained, determined, and adjudged by the county judge of Mercer county that the total number of legal votes cast at said election were as follows: For the railroad subscription, 1,683 votes, and against the railroad subscription, 1,250 votes, and that a majority of the legal votes cast at said election were in favor of said subscription. And it is now further ordered and adjudged that the county of Mercer does hereby subscribe to the capital stock of the Louisville Southern railroad $125,000 par value thereof, this subscription being made subject to and in accordance with the terms and conditions of the proposition as set forth in the petition recited in the order of November 18, 1886, above mentioned and voted on as hereinbefore recited."

Upon the order book of said Mercer county, as a part of the orders thereof, written thereon by the clerk of the court, among the orders signed by the judge thereof is the following:

Order.

"And upon the same day, to wit, January 10, 1887, this day, and before the above order was entered, came O. S. Poston and T. H. Hardin, two citizens and tax-payers of Mercer county, Kentucky, and presented the contract or agreement dated December 1, 1886,

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which reads as follows, said agreement being signed Louisville Southern Railroad Company, by J. W. Stine, president; Southern Contract Company, by Bennett H. Young, president:

23 "It is hereby agreed with the town of Burgin and its trustees, upon the part of the Louisville Southern Railroad Company, that if the present proposed subscription by Mercer county is carried the said Louisville Railroad Company will by the time the said Louisville Southern is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin, a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not, then the Louisville Southern guarantees that said Burgin district shall be exempt from taxes from and on account of said subscription—that is to say, the Louisville Southern will pay the taxes of said Burgin district.

This December 1, 1886.

LOUISVILLE SOUTHERN RAILROAD COMPANY,
By J. W. STINE, *President.*
SOUTHERN CONTRACT COMPANY,
By BENNETT H. YOUNG, *President.*"

"And move the court that the conditions therein be complied with before the bonds to be issued herein are delivered, and be added to the order this day applied for by the Louisville Southern Railroad Company as one of the conditions annexed thereto and as a part of the conditions of the issuing of said bonds and the order entering said subscription of Mercer county to said Louisville Southern Railroad Company; which the court refused to do. To all of which Poston and Hardin excepted. Before this order was made or acted upon John Nichols withdrew said paper, who had it before it was offered."

But the court finds that said paper is not an order of said Mercer county court and not properly on its order book.

I find that in pursuance of said order and vote the coupon bonds of the county of Mercer were prepared and executed to the extent of $125,000 by John W. Hughes, presiding judge of said county court, and the coupons attached were signed by Ben. C. Allin, the county clerk of said court, and thus signed, said bonds and coupons were delivered to D. L. Moore, who had previously been appointed by said county court trustee under the provisions of the act of May 15,

1886, and said order of January 10, 1887, and that he received said bonds on March 3, 1887.

24 The order of the said court appointing said Moore trustee, entered February 7, 1887, is as follows:

Order Appointing Trustee.

"This day came the Louisville Southern Railroad Company, by their attorney, and moved the court to appoint a trustee to hold the bonds in escrow, to be executed by the county of Mercer to the Louisville Southern Railroad Company in pursuance of an order heretofore made by this court on the 10th day of January, 1887, subscribing stock to said road, and thereupon the court appointed D. L. Moore trustee to hold said bonds in escrow, to be delivered to said Louisville Southern Railroad Company when said company shall comply with the terms and conditions of said subscription as set out in said order and as prescribed and set forth in an act of the legislature of Kentucky, entitled An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company, approved May 15, 1886. Said trustee before receiving said bonds is required to give bond, with good surety, to be approved by this court, for the faithful performance of his duty in the premises."

On February 14th, 1887, D. L. Moore executed bond, with surety approved by said county court, in words as follows, viz:

"Whereas, on the 7th day of Feb'y, 1887, D. L. Moore was appointed by an order of the judge of Mercer county court trustee to hold in escrow certain bonds therein mentioned and to deliver the same to the Louisville Southern Railroad Company when said company shall fully comply with the terms and conditions of a subscription as set out in said order, and the previous orders of this court relating thereto, and as prescribed *as* set forth in the act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886:

Now, therefore, I, D. L. Moore, as principal, and Jas. H. Moore and W. H. McBrayer, as surety, bind and obligate ourselves to the Commonwealth of Kentucky for the use and benefit of Mercer county and the Louisville Southern Railroad Company that the said D. L. Moore will faithfully perform his duty as trustee as aforesaid in the premises.

Feb. 14, 1887.

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Executed in my presence and approved by me this 14th day of Feb'y, 1887.

JOHN W. HUGHES,
Presiding Judge of the Mercer Co. Court.
D. L. MOORE, *Principal.*
J. H. MOORE, *Security.*
W. H. McBRAYER,
By C. M. DEDMAN, *Att'y-in-Fact.*"

25 I find that said D. L. Moore presented to said county court on the 3rd of July, 1888, his resignation as trustee, in a letter in these words, viz:

JULY 2, 1888.

To the judge of the county court of Mercer county:

Not being able, even with the advice of the best legal lights in this section, to make plain my duties as trustee of the Mercer County bonds, voted in aid of the Louisville Southern railroad, and fearing to assume a duty not plainly laid down by the act or the contract, I prefer to return the trust and deliver back the bonds in my custody rather than to proceed in the dark, and hereby tender my resignation.

(Signed) D. L. MOORE.

And thereupon the said court, with the consent of the Louisville Southern Railroad Company, accepted the resignation of the said D. L. Moore, and the court on the same day appointed Isaac Pearson trustee to hold said bonds and deliver same to the Louisville Southern Railroad Company when it complied with certain terms and conditions of the subscription, as set out — the previous order and as prescribed by the act of the legislation of Kentucky, entitled "An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and that said Pearson accepted the said trusteeship and executed bond, which was approved.

The said order is in these words, viz:

Order Appointing New Trustee.

"And the said Louisville Southern railroad, by their attorney-in-fact, consenting of record, the court thereupon accepted the resignation of the said D. L. Moore, trustee, as aforesaid.

"And thereupon the court appointed Isaac Pearson trustee to hold the bonds in escrow heretofore executed by Mercer county to the Louisville Southern Railroad Company, and to be delivered to said company when said company shall comply with the terms and

conditions of the subscription as set out in the previous orders of this court and as prescribed and set forth in an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886.

"Said trustee is required to give bond with good security to be approved by the court for the faithful performance of his
26 duties in the premises. And thereupon came the said Isaac Pearson and executed bond as required by law, with A. B. Bonta, Wm. H. Riker, Geo. Bohon, M. T. Threlkeld, M. Tabler, S. B. Sullivan, H. C. Williams, J. E. Cogar, and James M. Forsythe as his sureties, and said bond was approved by John W. Hughes, presiding judge of the Mercer county court, and so endorsed, and said bond is ordered to be spread upon the record of this court and is in the words and figures as follows, to wit:

"Whereas, on the 3rd day of July, 1888, Isaac Pearson was appointed, by an order of the Mercer county court, trustee to hold in escrow certain bonds therein mentioned, and to deliver the same to the Louisville Southern Railroad Company when said company shall fully comply with the terms and conditions of a subscription as set out in said order, and the previous orders of this court relating thereto, and as prescribed and set forth in an act of the legislature of Kentucky, entitled 'An act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886.

"Now, therefore, I, Isaac Pearson, as principal, and A. B. Bonta, W. H. Riker, George Bohon, M. T. Threlkeld, M. Tabler, C. B. Sullivan, H. C. Williams, J. E. Cogar and Jas. M. Forsythe, as sureties, bind and obligate ourselves to the Commonwealth of Kentucky for the use and benefit of Mercer county, and the Louisville Southern railroad, that the said Isaac Pearson will faithfully perform his duty as trustee aforesaid in the premises.

"July 3, 1888.

ISAAC PEARSON, *Principal.*
WM. K. RIKER.
A. B. BONTA.
GEORGE BOHON.
M. T. THRELKELD.
M. TABLER.
C. B. SULLIVAN.
H. C. WILLIAMS.
J. E. COGAR.
1—213 JAMES M. FORSYTHE.

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"Executed in my presence and approved by me this 3rd day of July, 1888.

"JOHN W. HUGHES,
"*Presiding Judge of Mercer County Court.*"

27 I find that said Pearson as said trustee received on the 9th day of July, 1888, all of said bonds with coupons attached from said D. L. Moore, and said Moore was discharged from his trusteeship.

I find that the bonds which were delivered to Isaac Pearson, trustee, were dated January 10th, 1887, and were each of the denomination of one thousand dollars ($1,000), and of like tenor and date, and the following is a copy of one of said bonds:

(Omitted per stipulation, as it is copied in full in the petition, *supra.*)

28 I find that prior to June 1st, 1888, the Louisville Southern railroad was completed from the city of Louisville, in Jefferson county, via Shelbyville, in Shelby county, and Lawrenceburg, in Anderson county, and in Mercer county to the depot of the Southwestern railroad in Harrodsburg, and that said company owned all the capital stock of the Southwestern railroad, had taken possession of its line, and had extended the track to Burgin, which was a village on the Cincinnati Southern railroad, and there connected it with said Cincinnati Southern railroad, and that on said day, June 1st, 1888, a train of cars moved by a steam-engine passed over said railroad from Louisville through Harrodsburg to Burgin and returned over said railroad track to Louisville, and since said time said railroad from Louisville through Harrodsburg to Burgin has been continuously operated as the Louisville Southern railroad.

That on the 27th of June, 1889, the Southwestern railroad was consolidated with the Louisville Southern railroad and was by an agreement of that date merged into the latter corporation, and that said Southwestern railroad was constructed and operated prior to November, 1886, and ran from its depot in Harrodsburg to a junction with the Cincinnati Southern railroad, which was about three-fourths of a mile south of Burgin, and that after said railroad came into possession of the Louisville Southern Railroad Company
29 it was extended to Burgin and the junction with the Cincinnati Southern R. R. made at that point, and this was done prior to June 1st, 1888.

I find that from Harrodsburg to the point where the Louisville Southern railroad crosses the line between Anderson and Mercer counties is fifteen (15) miles and the distance from Harrodsburg to Burgin over the Southwestern railroad as extended is 4.72 miles, and Burgin is three (3) miles from the south line of Mercer county and from the extreme east line of Mercer county 4.74 miles, and that following the line of the Cincinnati Southern railroad to south line of Mercer, which is the dividing line between that county and Boyle, Burgin is distant three (3) miles and from Danville seven (7) miles. The nearest point to Mercer county line from the Southwestern railroad is two miles.

I find that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of county, but that its railroad entered Mercer county on the line of said county next to the Anderson county and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point.

The railroad thus constructed gave a railroad connection by the Cincinnati Southern railroad, either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee.

I find that about the time of the passage of a train of cars of said road from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the tax-payers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him before his resignation as trustee.

This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed. While this discussion was going on and before Pearson, trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern railroad prepared to extend its railroad toward and to the town of Danville, Boyle county, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer county line.

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There was a movement made to have the court of claims of said county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the county judge, Hon. John W. Hughes, and all of the justices of the peace of said county. The court after argument declined as a court to instruct the trustee as to his action, but upon motion of one of the justices they passed and had spread upon the records this resolution, viz:

"At a county court of claims for Mercer county, at the court-house in Harrodsburg, on Tuesday, the 26th day of June, 1888.

Present: John W. Hughes, J. P. M. C. C., and M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, Jno. W. Reed, E. R. Norton, R. L. Mullins, E. I. Massie, N. Harris, G. J. Johnson, B. O. Jones, A. Johnson, J. C. McIntire, and Jno. T. Pankey, justices of the peace of Mercer county.

G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern railroad, but as individuals they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle county line.

And said motion being seconded, the ayes and nays were taken, and resulted as follows:

Ayes, 12, as follows:

M. Cummins, C. B. Connor, James Yeast, Sr., A. S. Hendrew, Jno. W. Reed, E. R. Norton, R. L. Mullins, N. Harris, G. J. Johnson, B. O. Jones, J. C. McIntire, and Jno. T. Pankey.

Nays, none; not voting, two, as follows:

W. I. Massie and A. Johnson."

I find that Pearson, trustee, after his acceptance of his trusteeship, decided the conditions precedent had been performed by the
31 Louisville Southern Railroad Company and — was entitled to the delivery of $105,000 of the bonds of Mercer county, and that on the — day of August, 1888, he did deliver said bonds in the presence of Hon. Jno. W. Hughes, county judge of said county, and that the past-due coupons on said bonds were cut off before delivery and were burned in the presence of said Hughes, and that there was delivered to said county at the time of delivery of said bonds a cer-

BLEED. T

tificate for $105,000 of the capital stock of the Louisville Southern Railroad Company. I find that said stock was accepted by said county and voted by the Hon. John W. Hughes as county judge at stockholders' meeting on at least two occasions, one on December 18th, 1888, and another on May 26th, 1890, and that said stock certificate is still held by said County of Mercer, and that it has never been tendered to the Louisville Southern R. R. Co. or any one representing said company.

I find that said stock was so voted by said John W. Hughes, county judge of Mercer county, at meeting of the stockholders of the Louisville Southern Railroad Company, in favor of the following resolutions, to wit:

I.

On December 13th, 1888, same was voted in favor of the following resolutions, to wit:

I. A resolution approving and directing the execution and delivery of a lease of the Louisville Southern railroad to the Louisville, New Albany & Chicago Railway Company for a term of thirty years.

II. A resolution authorizing and directing:

(1.) The extension of the main line of the Louisville Southern road from Lawrenceburg via Versailles to Lexington and Georgetown, Kentucky.

(2.) A consolidation of the Louisville Southern Railroad Company with the Louisville and Southeastern Railway Company, the Versailles and Midway Railway Company, and the Southwestern railway or any of them.

(3.) The increase of the capital stock of the company in the amount of $1,000,000 and the execution and delivery of bonds of the Louisville Southern Railroad Company to the amount of $1,500,000, to be secured by mortgage on the proposed extension of the line for the purpose of constructing same.

32 III. A resolution approving and directing execution and delivery of a contract with the Southern Contract Company for the construction of said proposed new or extended line for the express purpose, as above mentioned, of ultimately reaching "the Virginia line" by this route.

THROUGH POOR COPY

II.

On May 28th, 1890, the County of Mercer voted its 1,050 shares of stock in favor of the following resolutions:

I. A resolution thanking the president and directors "for the manner in which they have conducted the company's business during the past year."

II. A resolution accepting a legislative amendment of the charter of the railroad company; said amendment authorizing the company to issue its bonds "for any corporate purposes" in any amounts desired and to secure same by mortgage; also authorizing the company to lease its road to any other railroad company.

III. A resolution approving the action of the board of directors in taking possession of the road on March 27th, 1890, and in effect cancelling the lease thereof to the Louisville, New Albany and Chicago Railway Company.

IV. A resolution approving the consolidation of the Louisville Southern Railroad Company with the Southwestern Railroad Company.

V. The stock was voted for the election of the directors for the ensuing year.

At the same meeting the County of Mercer voted its said stock to approve the minutes of two preceding meetings of stockholders held respectively in May, 1889, and May, 1890.

I find that said County of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1st, 1892, and have not paid any interest on said bonds since that time.

I find that J. W. Stine signed as president of the Louisville Southern Railroad Company, as did Bennett H. Young as president of the Southern Contract Company, a writing purporting to be a contract with the town of Burgin. This writing was signed the day of its date, and was given before the election in the county of Mercer upon the question of the subscription of the $125,000 to the capital stock of the Louisville Southern Railroad Company; that the execution of said writing was not generally known to the voters of said
33 county before said election, but was known to many of the voters at the Burgin precinct and induced some of said voters

to vote for the subscription. I further find that the execution of said writing was known to the Hon. John W. Hughes when he determined the result of the vote of said election and subscribed for the $125,000 of the capital stock of said Louisville Southern Railroad Company; and that there was no legal or corporate authority in either said Stine or Young to bind their respective companies by said writing. The said writing is as follows:

Burgin Agreement.

It is hereby agreed with the town of Burgin and its trustees upon the part of the Louisville Southern Railroad Company that if the present proposed subscription by Mercer County is carried, the said Louisville Railroad Company will, by the time the said Louisville Southern is constructed to Harrodsburg, extend and cause to be extended the Southwestern railroad to the town of Burgin, a connection with the Cincinnati Southern railway, and operate daily and permanently said Southwestern and said extension with the Louisville Southern, and if not then, the Louisville Southern guarantees that said Burgin district shall be exempt from taxes for and on account of said subscription—that is to say, the Louisville Southern will pay the taxes of said Burgin district.

This December 1st, 1886.

LOUISVILLE SOUTHERN RAILROAD COMPANY,
By J. W. STINE, *President.*
SOUTHERN CONTRACT COMPANY,
By BENNETT H. YOUNG, *President.*

I find that an indemnifying bond was executed and delivered to Pearson, trustee, about the time of the delivery of the $105,000 of bonds, the terms of which are as follows, viz:

Bond of Indemnity to Pearson.

AUGUST 6TH, 1888.

Whereas the County of Mercer voted a subscription of one hundred and twenty-five thousand dollars to the Louisville Southern Railroad Company, on certain terms and conditions recited in the order of the Mercer county court made the 18th day of November, 1886, which order is made part hereof; and

34 Whereas the bonds for the payment of said subscription have been signed by the judge of the Mercer county court and then placed in the hands of Isaac Pearson, as trustee, who has

THROUGH POOR COPY

executed bond with A. B. Bonta, W. H. Riker, George Bohon, M. K. Threlkeld, C. B. Sullivan, H. C. Williams, J. E. Cogar, and James M. Forsythe as his sureties for the faithful discharge of his duties as trustee; and

Whereas the round-house mentioned in said order of subscription, as well as all other antecedent conditions therein set forth and set forth in the act of legislature under which said subscription was voted and made and claimed by said Louisville Southern Railroad Company to have been complied with so as to make one hundred and five thousand dollars of said bonds now deliverable to said company, and said company, by its written obligation, agreed and bound itself to and with John W. Hughes, presiding judge of the Mercer county court, for the benefit of said county, to locate in Harrodsburg or in one-fourth of a mile thereof, and within one year from the date of this bond to construct and operate permanently within said town or one-fourth of a mile thereof its terminal or division machine or repair shops and such other shops or structures as may be necessary or convenient to the operation of the road of said company, which agreement is executed by the proper officers of said railroad company, accompanied by certified copy of the resolution or proceedings of the stockholders of said company; and

Whereas said railroad company have executed bond under the provisions of "An act for the protection of counties, cities, etc., subscribing stock in railroads, turnpikes, and other improvements," approved April 30, 1873; and

Whereas the said trustee in good faith believes that the conditions and terms of the order of subscription and other orders in the case have been complied with so as to entitle the said company to receive $105,000 of said bonds, but some expressing doubts thereof, and the said railroad company, in order to obtain possession of said $105,000 of said bonds, are willing to and do hereby covenant and agree to save said trustee and his sureties harmless, if the trustee will and does deliver said bonds to said company, and with this understanding and agreement the said trustee had delivered $105,000 of said bonds to said company, after cutting therefrom all past-due coupons:

"Now this contract of indemnity witnesseth, that the Louisville Southern Railroad Company, through its duly authorized
35 officers, and being authorized to execute this contract and covenant by a vote of its stockholders and directors, together with Bennett H. Young, R. H. Veech, C. D. Price, W. H. McBrayer, and W. T. Grant, as its sureties, in consideration of the premises and the delivery of the bonds, the receipt of which is hereby acknowledged, do hereby jointly and severally bind and obligate ourselves

to said Pearson and his said sureties and each of them that they will indemnify and save harmless said Pearson and his sureties against all damages, loss or costs, ordinary or extraordinary, that they or any of them may sustain or may be held liable for on account of the delivery of said bonds aforesaid."

LOUISVILLE SOUTHERN RAILROAD COMPANY,

[SEAL] By BENNETT H. YOUNG, *President.*

Attest: W. H. HILL, *Secretary.*

BENNETT H. YOUNG.
R. S. VEECH.
V. D. PRICE.
W. H. McBRAYER.
W. T. GRANT.

I find from the evidence that this bond of indemnity was given to satisfy the sureties of Pearson and not to influence his judgment or action in deciding the condition precedent had been performed by the Louisville Southern Railroad Company.

I find that the Provident Life and Trust Company was at the institution of this suit, the *bona fide* holder for value of the bonds mentioned to the extent of $100,000 with the coupons thereon, having purchased some of the Investment Company of Philadelphia, and in that city, at par and accrued interest amounting to $101,197.22, without knowledge or notice of any defects, either in the execution or delivery of same, or of any defenses the County of Mercer has or might present to the recovery of same.

The court also delivered an opinion herein, which is ordered to be filed.

JUDGMENT.

It is thereupon considered by the court that the plaintiff, The Provident Life & Trust Company of Philadelphia, do recover of the defendant, The County of Mercer, the sum of $2,500, with interest from the 10th day of July, 1892, and the further sum of $2,500, with interest from the 10th day of January, 1893; and $2,500, with interest from the 10th day of July, 1893, and $2,500 with interest from the 10th day of January, 1894, making in all the sum of eleven thousand two hundred and thirty-three $\frac{33}{100}$ dollars
36 ($11,233.33), with interest from this date; and its costs herein expended, for which it may have execution.

The opinion above referred to is as follows:

THROUGH POOR COPY

Circuit Court of the United States for the District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
THE COUNTY OF MERCER, Defendant.
} Opinion.

These being the material facts, the first inquiry is, Can the defendant raise the question of the non-performance of the condition precedent in regard to constructing a railroad through the county of Mercer—that is, running from one boundary line of the county, through the county to the opposite or to another boundary line of said county?

The 3rd and 4th sections of the act authorized the subscription to the capital stock of the Louisville Southern Railroad Company and its payment in negotiable coupon bonds; the 4th section provides that—

"The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company, in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow and delivered to the said railroad company when it shall become entitled to the same by the construction of the road through such county; provided, however, that such trust company or
37 trustee shall, before receiving such bonds, give bond, with good surety, *provided* by the county judge, for the faithful performance of his or its duty in the premises.

And provided further, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The terms of the subscription of $125,000 to the Louisville Southern Railroad Company *was* in conformity to this provision of the act, and it will be observed that there were several things to be determined on the face of this act in regard to the condition precedent and the performance thereof. The railway of the Louisville Southern Railroad Company was to be "so completed through such county that a train of cars shall have passed on the same," and this railway

BLEED.

should "pass to or through the corporate limits of the town of Harrodsburg," else the bonds were not to be valid.

These coupon bonds were by the terms of the act to be executed by the county judge and clerk as soon as practicable after the subscription to the stock was voted, and then to be given to a trustee appointed by the county judge, and by whom a bond for the faithful performance of his duty had theretofore been given to the county, to be held by him until these conditions were performed.

Neither this act or the terms of the subscription expressly state this trustee should conclusively determine whether these conditions precedent had been performed by the railroad company; but must not that have been the intent?

It is clear this trustee was to deliver the bonds when the conditions precedent were performed; but upon whose judgment?

Not upon the judgment of the county judge, we think, because the act expressly requires him to execute the bonds and deliver them to the trustee, and the order of submission and the terms of the subscription required that the trustee should cut off and destroy in the presence of the county judge all past-due coupons, thus recognizing that he was only to be a witness to the acts of the trustee, and not a judge.

The decision of whether these conditions precedent had been performed and these bonds should be delivered must have been in the trustee, or in nobody. These negotiable bonds payable to bearer of the county of Mercer were by the provisions of this act and the terms of this subscription to go upon the open market as valid obligations of the county by force of the decision and delivery of the trustee, or they were always to be open to the inquiry as to
38 their validity or invalidity whenever the county chose to raise the question of the performance of these conditions precedent.

It is insisted that these conditions precedent were physical facts which a purchaser of the bonds was bound to know had been performed at his peril; these bonds had thirty years to run, and one of the conditions was that the railway should be so constructed through the county that a train of cars shall have passed over it. Thus a purchaser even twenty-five years after their date would have to prove, if the question was then made, not only that this railway was constructed through the county of Mercer, but that a train of cars had or could have passed over it before the delivery of the bonds, or, if not before, within five years after the subscription of stock, January 10th, 1887.

THROUGH POOR COPY

If the question of the performance of these conditions precedent, because they were physical facts, were to be kept open indefinitely, why should there have been the selection by the county judge of a trustee, and why should such trustee be required to give bond with security for the faithful performance of his duty? Indeed, why should the authority have been to issue negotiable bonds at all if the legislative intent and that of voters of Mercer county was that the question of their validity could be made at any time and against every *bona fide* holder?

Again, this record shows that the performance of these conditions precedent did not depend upon the determination of physical facts only, but that the meaning of "through" in the act and in the terms of the subscription of the stock was most important to determine, and about this there was and is serious and honest difference of opinion.

It is quite evident that the county authorities construed the authority of the trustee to be to determine for the county the question of the performance of the conditions precedent and upon this determination to deliver or refuse to deliver these bonds. This is clearly shown by the resolution of the justices of the peace presided over by the county judge on the 26th day of June, 1887, and by the statement of the Hon. Jno. W. Hughes, county judge, as well as his acceptance of the resignation of D. L. Moore, as trustee, and his action at the time of the delivery of these bonds and since.

It should not be overlooked that these bonds could be legally issued by the County of Mercer, and that they were perfect commercial instruments in form, when delivered by the county judge to the trustee Moore and when handed over by him to his successor,
39 Pearson, and that the obvious purpose of the act which authorized these bonds was to make these bonds commercial instruments at some time or other, and as such to bind the county.

These bonds are clearly distinguishable from that class of bonds attempted to be issued by municipalities beyond the constitutional limit, and when the means of knowing such limit is of record, or when the municipality is without legislative authority to issue the bonds at all, or in the manner or in form in which they had attempted to be issued. It is insisted the word "escrow" in this act is used in its strictest and most technical sense, and that unless these conditions precedent had been performed, in the opinion of the court the plaintiff cannot recover, although these bonds were delivered by the trustee to be put on the market and were purchased for full value without notice or knowledge of the non-performance of the conditions precedent.

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The able counsel quotes from 6 Am. & Eng. Enc. of Law, page 867, that "when a deed is delivered merely as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been performed. * * * Even if the grantee obtains possession of it before the condition has been performed, yet it is not the grantor's deed and he may avoid it by pleading *non est factum*. The grantee cannot acquire the title by gaining possession of the deed by theft, by fraud, or by the voluntary act of the depositary, but only by the performance of the condition. * * * Although it is well settled that an escrow delivered without authority or obtained fraudulently passes no title to the grantee or obligee, there is some conflict of opinion as to the rights of an innocent purchaser from a grantee who has obtained possession of the escrow without performing the conditions, but the better opinion seems to be that such purchaser acquires no title."

We have indicated the opinion that, construing this entire act and considering its undoubted purpose to authorize negotiable bonds to be issued and sold on the market to raise money, the trustee Pearson did not receive these bonds merely as an escrow, and that the use of the word escrow in this act does not so limit the holding or authority of the trustees.

But if it be conceded these bonds were held by the trustee Pearson merely as an escrow and that the quotation be a correct statement of the law as applied to deeds, is there no difference when the escrow are bills of exchange, notes and other commercial paper, and has passed into the hands of an innocent and *bona fide* purchaser for value?

The learned counsel concedes a difference and argues that the difference is because a negotiable instrument does not bear on its face any evidence that it ever has been in escrow.

But does it not often happen that this is true in regard to a deed as well as to a note or other negotiable instrument which has been held as escrow?

We think the difference in the rule as to innocent purchasers for value is and should be because of the difference in the nature, purpose and legal effect of a deed and that of commercial paper.

The deed is the conveyance of title to lands and other visible property which does and is not intended to pass by delivery or to be used in general trade and commerce, and the other is an obligation to pay money to order or bearer and passes and is intended to be used by mere endorsement or delivery; hence in the interest of trade and commerce the obligor in a commercial instrument should take the risk of the action of the depositary whereby the commercial

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paper goes on the market or in the avenues of trade and comes into the hands of an innocent purchaser for value.

In Fearin *vs.* Clark, 16th Mass., page 76, which was a case where a promissory note had been delivered by the depositary to the payee without the conditions precedent being performed, and when the court held the note was good and valid in the hands of an innocent purchaser without notice, the court say:

"The rule is different in regard to a deed, bond or other instrument placed in the hands of a third party as an escrow, to be delivered on the happening of a future event or contingency; in that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it is placed in the hands of the party to whom it was entrusted. But the law aims to secure free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiations of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers to fall on those who enabled them to hold themselves out as the owners of the paper *jure despondi* and not innocent holders who have taken it for value without notice." This view is sustained in the case of Vollett *vs.* Parker, 6 Wend., 619. In the case of Bar-
41 ton *vs.* Huntington, 21 Mich., 433, the court states the law as herein indicated and draws a distinction between the case where the depositary improperly delivers a bill or negotiable note, and that where the bill or note has not been delivered by the payer at all, but is taken without the knowledge or consent of the payer while in his possession.

There is another view of the facts in this case which entitled the plaintiff to recover, we think, and that is the conduct of the county authorities of Mercer presumably with the consent of the tax-payers of the county.

There was a difference of opinion as to the meaning of the word "through" as used in the act of the legislature and the terms of the subscription, hence whether the Louisville Southern Railroad Company had complied with the conditions precedent in regard to running its railroad through the county of Mercer, and while that difference and uncertainty existed the railroad company commenced and did prepare in part to remove all doubt by running its railroad through the county—that is, from one line of the county to another line of the county to Danville, which would be a performance of the conditions precedent, by any construction of the meaning of the condition, and while the company was thus preparing to run its railroad

BLEED.

to Danville the trustee, Pearson, assumed to and did deliver these bonds to the Louisville Southern Railroad Company, and the County of Mercer, by its county judge, received the certificate of stock for the amount of capital stock paid for by said bonds, which stock was voted and the interest on said bonds paid until the five years expired within which the conditions precedent if unperformed could have been performed.

This delivery of these bonds was made after public notice and under the individual advice of all of the justices of the peace of the county except two, and they expressed no opinion, and in the presence of the county judge who witnessed the destruction of the *passed*-due coupons, and accepted the certificate of stock given for the bonds thus delivered.

If a delivery of even a deed given by one person to another and held in escrow had been delivered by the depositary under circumstances similar to those in this case, surely the deed thus delivered would bind the grantor whatever may have been the terms of the escrow. How much stronger, then, is a case when the subject of the escrow is negotiable bonds and the holder is an innocent and *bona fide* holder for value.

42 It may, however, be insisted that in the instance mentioned of the deed executed by one person to another and held in escrow, the delivery would be good under circumstances similar to those in this case because of the grantee's knowledge and acquaintance in the delivery of the deed under a construction of the condition precedent, and the belief of the holder of the escrow that the condition precedent thus construed had been performed, while in the case at bar Mercer County had no representative and could have none to acquiesce to any construction of the condition precedent or to consent to the delivery of these bonds.

This suggestion emphasizes, we think, the inaccuracy of the contention that the legislature intended to authorize the issuing of negotiable coupon bonds with thirty years to run, and of course for the purpose of sale by the Louisville Southern Railroad Company for cash in the market, and yet it authorized no one to determine the validity of the bonds so as to bind the County of Mercer, and thus make them in law what they appeared on their face to be, binding commercial obligations in the hands of those who purchased for value without notice. If no one could bind the county, and nothing that was or could be done by its officers could make these bonds binding, then their validity remained an open question until some court having jurisdiction determined the question in a suit against said county, and then only to the extent of the bond or coupon owned

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by the suing party, and thus their value as commercial paper is destroyed.

It should require clear language before a court should construe one part of an act so as to nullify another, and thus destroy the value and efficiency of the whole act.

The effect of the giving of the writing to the town of Burgin by Messrs. Young and Stine on the 1st of December, 1886, would have been a proper inquiry when the county judge was considering the result of the election on December 4th, 1886, but the county judge declared the question of subscribing for the stock in the Louisville Southern Railroad Company as submitted carried and subscribed for the stock and executed the bonds with full knowledge of the execution and delivery of this writing. The defendant is bound by this action of its county judge, and cannot plead the execution and delivery of that paper or its effect upon some of the voters of the county as a defense to this suit.

We deem it unnecessary to decide whether the Louisville Southern Railroad Company did perform the condition precedent to the delivery of these bonds by constructing its railroad through
43 the county of Mercer within the meaning of the provisions of the act of the legislature and the terms of the subscription.

We have made no finding as to parol representation or promises alleged to have been made by the officers of the Louisville Southern Railroad Company before the election of December 4th, 1886, because we think all this testimony is incompetent, and the exceptions thereto are sustained.

We conclude the plaintiff should recover the amount of the coupons sued on, with interest from their respective maturities.

The bill of exceptions above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, Plaintiff, vs. COUNTY OF MERCER, Defendant.	Bill of Exceptions.

Be it remembered that on the trial of the above-entitled cause the defendant offered to prove and avowed that it could prove by divers witnesses that at the time the county of Mercer was being canvassed for the subscription in controversy, to induce the citizens to vote for the subscription, divers and sundry representations were made by

public addresses and conversations by persons favoring this subscription to the effect that it was the purpose of the company to build its line to the coal-fields in eastern Kentucky, passing through Mercer county, and through Lancaster, in Garrard county, and that there would be a great advantage to the county of Mercer in being so connected with the eastern coal-fields, in that it would bring fuel within the reach of the citizens of Mercer county at much cheaper rates than they were now paying; and avowed that it offered this evidence to show the contemporaneous construction of the parties upon the terms of the law requiring the railroad to be built through Mercer county. The plaintiff objected to this evidence and the court sustained the objection; to which ruling of the court defendant excepted and still excepts, and at the request of the defendant the court has signed this bill of exceptions and caused the same to be enrolled and to be filed and made a part of the record, which is now done.

(Signed) JNO. W. BARR, *Judge*.

44 The petition for a writ of error and assignment of errors above referred to is as follows:

Circuit Court of the United States, Sixth Circuit, District of Kentucky.

PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Plaintiff,
vs.
COUNTY OF MERCER, Defendant.

The County of Mercer, defendant herein, comes now and asks the court for writ of error herein from the judgment herein entered on the 30th day of April, 1895, and now assigns for error the following:

1. That the court erred in giving judgment for the plaintiff upon the special finding of *the* fact.

2. That the court erred in finding that the plaintiff was a *bona fide* holder for value and without notice of the coupons sued on or the bonds from which they were taken, or any of said bonds or any of said coupons.

3. That the court erred in refusing to find that the Louisville Southern Railroad Company had failed to comply with the conditions precedent to the validity of the said bonds.

4. That the court erred in failing to adjudge that under the act authorizing the subscriptions by Mercer County to the stock of the Louisville Southern Railroad Company the bonds from which the coupons were taken herein were void and of no effect, and that the coupons taken from said bonds were likewise void and of no effect.

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5. That the court erred in holding that Isaac Pearson, trustee, had the right to determine the question as to the performance by the Louisville Southern Railroad Company of the conditions precedent to the validity of said bonds.

6. That the court erred in holding that the County of Mercer was estopped to say that the said conditions had not been fulfilled, and was estopped to say that the said bonds were invalid and not binding.

7. That the court erred in refusing to admit the testimony offered and rejected as set forth in bill of exceptions.

And the petitioner, Mercer County, presents herein its
45–47 bond, conditioned according to law, and now asks that its writ of error be allowed and the bond approved.

J. B. THOMPSON,
HUMPHREY & DAVIE,
For Mercer County.

(The appeal bond was executed, a writ of error to the U. S. circuit court of appeals for the sixth circuit allowed, appearance entered thereto, and the cause was argued and submitted. The bond, writ of error, &c., are omitted from the printing per stipulation of counsel.)

48 And afterwards, to wit, on March 3, 1896, a judgment was entered upon the journal of said court in said cause, which judgment reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error, *vs.* THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Defendant in Error.	No. 326. Error to the Circuit Court of the United States for the District of Kentucky, at Louisville.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged that the judgment of the said circuit court in this cause be, and the same is hereby, reversed, and the cause is remanded to the court whence it came, with directions to enter a judgment in accordance with the opinion of this court.

49 And afterwards, on the same day, to wit, March 3, 1896, the following opinion was filed in said cause; which opinion reads and is in the words and figures following, to wit:

Opinion.

United States Circuit Court of Appeals, Sixth Circuit.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error, *vs.* THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA, Defendant in Error.	No. 326. Error to the Circuit Court of the United States for the District of Kentucky.

Submitted Oct. 30, 1895; decided March 3, 1896.

Before TAFT and LURTON, circuit judges, and SEVERENS, district judge.

The County of Mercer subscribed for stock in the Louisville Southern Railroad Company to the extent of $125,000.00 and issued in payment therefor 125 bonds, each for $1,000.00, dated January 10th, 1887, payable in 30 years, with interest payable semi-annually at five per cent., for which coupons were attached. These bonds, with past-due coupons detached, were received by the railroad company in August, 1888, and 100 of them subsequently came to the hands of the Provident Life & Trust Company.

This suit was brought upon four hundred coupons past due and unpaid. The county denied liability upon the bonds and presented a number of defenses, which, so far as now insisted upon, will be hereafter stated. A jury was waived and the decision of the law and facts submitted to the Hon. John W. Barr, district judge, holding the circuit court, who made a special finding of facts upon which he gave judgment against the county and for the plaintiff below. The bonds were in the usual form of negotiable county bonds. The only recital concerning the authority for their issuance is in these words:

"This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and

50 twenty-five, the same having been issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the County of

THROUGH POOR COPY

Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15th, 1886, and pursuant to an order entered by the county judge of said county in conformity with said act subscribing in behalf of said county for the capital stock of the said Louisville Southern Railroad Company in the sum of one hundred and twenty-five thousand dollars ($125,000), which order was entered of record in said court on January tenth, A. D. eighteen hundred and eighty-seven (1887)."

The act granting power to subscribe for stock of the Southern Railroad Company, which is referred to in the recital above set out, was passed May 15th, 1886. The first section of that statute authorized Mercer County to subscribe to the capital stock of the Louisville Southern Railroad Company, " as hereinafter provided," and that it might pay for same in the " negotiable coupon bonds of said county." The second section provided the method of applying for a subscription and the manner in which a vote of the people should be taken upon the proposition for a subscription. The third and fourth sections were in these words:

" SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk."

" SEC. 4. The said bonds shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road
51 through such county: Provided, however, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: and provided, fur-

ther, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

Among the facts specifically found by the circuit court and deemed essential to the proper decision of the questions now to be determined are these:

1. That all of the requirements, provisions, and conditions mentioned in sections 2 and 3 of the act of May 15, 1886, had been duly complied with.

2. That one D. L. Moore was selected and appointed trustee by an order of the county court of Mercer county, and entered into bond for the faithful performance of his duty under the act aforesaid, the bond being payable to the State of Kentucky for the use of Mercer county and the Louisville Southern Railroad Company.

3. That thereupon the bonds of the county, duly signed and sealed, as provided by section 3 of the act, were deposited with him to be held as provided in the act.

4. That July 3, 1888, said Moore, being unable to satisfy himself as to the proper discharge of his duties, tendered his resignation, which was accepted, and on the same day one Isaac Pearson was appointed trustee by the Mercer county court, who gave bond of like character to that which had been required from Moore.

5. Concerning the provision of section 3 of the act that the bonds thus deposited in escrow should not be valid obligations "until the railway of the said company shall have been so constructed through such county that a train of cars shall have passed over the same," the court found that the Louisville Southern Railroad Company had constructed a line of railway from the boundary line between Anderson and Mercer counties, thence to Harrodsburg; that there was a railroad known as the Southwestern railroad, which owned and operated a line between Harrodsburg and Burgin, in Mercer county, and that this piece of old road was consolidated with the Louisville Southern. At Burgin a junction was made with the Cincinnati Southern railroad, an independent corporation, whose line extended from Cincinnati to Chattanooga, Tennessee. The precise finding as to the location of Burgin, with reference to the nearest county line, was in these words:

52 "The nearest point to Mercer County line from the Southwestern railroad is two miles. I find that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of county, but that its railroad entered Mercer county on the line of said county next to the

THROUGH POOR COPY

Anderson County — and ran through said county fifteen miles to Harrodsburg, and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point.

"The railroad thus constructed gave a railroad connection by the Cincinnati Southern railroad either northeast to Cincinnati, Ohio, or southwest to Chattanooga, Tennessee.

"I find that about the time of the passage of a train of cars of said road from Louisville to Burgin, and for some time thereafter, there arose a question of whether the conditions precedent to the delivery of $105,000 of the bonds of the county had been complied with by the Louisville Southern Railroad Company. There was some difference of opinion among the tax-payers in said county upon this question, and the trustee, Moore, had doubts as to whether he could properly deliver these bonds, but there was no formal demand made upon or refused by him for his resignation as trustee.

"This question of whether the railroad must be built from one line of the county to another was publicly and generally discussed. While this discussion was going on, and before Pearson, trustee, had determined that the condition precedent had been performed, and that he would deliver $105,000 of the bonds, the Louisville Southern railroad prepared to extend its railroad toward and to the town of Danville, Boyle county, which was 7.47 miles distant from Harrodsburg, by acquiring the rights of way with one exception to the Mercer County line.

"There was a movement made to have the court of claims of said county instruct the trustee as to his duty in the premises, and that court, consisting of the county judge and the justices of the peace of said county, met on the 26th of June, 1888, and a full discussion was had before said court, which consisted of the county judge, Hon. John W. Hughes, and of all of the justices of the peace of said county. The court, after argument, declined as a court to instruct the trustee as to his action, but, upon motion of one of the justices, they passed and had spread upon the records this resolution, viz:

53 "G. J. Johnson, as justice of the peace of this county, offered into court the following motion, which is ordered to be noted of record, and is as follows:

"The members of this court do not believe that they have any right to enter an order directing the trustee to deliver the bonds of this county to the Louisville Southern railroad, but as individuals

they are of the opinion that such delivery should be made and the construction of the railroad not forced to the Boyle county line.

"And said motion being seconded, the ayes and nays were taken, and resulted as follows:

"Ayes, 12; nays, none; not voting, two."

6. The court found that thereafter "Pearson, trustee, decided that the conditions precedent had been performed by the Louisville Southern Railroad Company and was entitled to the delivery of $105,000 of the bonds of Mercer county."

7. The court further found that in August, 1888, said one hundred and five bonds were delivered to said railroad company in the presence of the county judge of Mercer county, who cut off and destroyed the past-due coupons thereon before delivery, and that there was then delivered to said county judge a certificate for $105,000 of the capital stock of the railroad company, which was accepted and subsequently voted at two meetings of stockholders of said company, and that this stock had never been returned or tendered to said railroad company.

8. The court further found "that said county of Mercer regularly levied an annual tax to meet the semi-annual interest on said bonds, and paid interest thereon for the years 1889, 1890, and 1891, and the interest due January 1st, 1892, and have not paid any interest on said bonds since that time."

9. The court found that the plaintiff was a *bona fide* holder for value of the bonds mentioned to the extent of $100,000.00, with the coupons thereon, and had no knowledge or notice of any defects either in the execution or delivery of same, or of any defense the county has or might present to the recovery of the same.

LURTON, circuit judge, after making the foregoing statement of facts, delivered the opinion of the court:

The primary question which is to be decided is this: Were the bonds now held by the appellee corporation issued without authority of law, and in violation of the restrictions and conditions imposed by the act of May 15th, 1886, heretofore set out, and under which they purport to have been issued?

54 If they were issued in violation of the substantial provisions of the permissive act, they were void unless they have fallen into the hands of an innocent purchaser for value, and the requisite circumstances exist to constitute an estoppel precluding the county from showing that in fact they were issued in violation of law.

THROUGH POOR COPY

Passing for the present all the conditions precedent to the actual preparation and formal execution of the bonds under the third section of the enabling act, we shall consider the terms and conditions imposed by the fourth section so far as the issuance of the bonds is affected by that section. Aside from the positive provision of the fourth section, it is evident upon obvious principles of law that these bonds when prepared and formally executed according to the provisions of the third section were invalid obligations as lacking the essential element of delivery, a step as necessary to the validity of a bond or other negotiable instrument as it is to the existence of a deed. 1 Dan. on Negotiable Instruments, sec. 63; Young *v.* Clarendon Township, 132 U. S., 353. But whatever doubt might exist as to the obligatory character of these bonds while still in the hands of the county officials who had prepared and signed them, the fourth section in clear terms resolves. No power to make delivery of the bonds was conferred upon the county judge or any other officer of the county, and all duty and power intrusted to them terminated with their formal execution, the act itself declaring that the bonds, thus apparently the formal contracts of the county, "shall not be binding or valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company."

The duty of the county judge with reference to these incomplete instruments pending compliance with the condition upon which they might become vital obligations by delivery was to "order that such bonds shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county." This last statutory duty was performed and the bonds were "deposited" with a trustee, to be held in escrow and delivered when the condition authorizing delivery had been performed. That condition was that the railroad of the Louisville Southern Railroad Company should be completed "through" the county of Mercer, so that a train of cars should have passed over the same. The defence of the county is that the railroad was
55 never constructed "through" the county, and that the trustee violated his duty and delivered them before that condition had been complied with. The finding of fact, touching immediately upon compliance with this condition, was "that the Louisville Southern railroad did not run from one line of the county of Mercer through to the opposite or to another line of the county, but that its

BLEED.

railroad entered Mercer county on the line of said county next to Anderson county and ran through said county fifteen miles to Harrodsburg and from there to Burgin, where a junction was made with the Cincinnati Southern railroad, making in all 19.72 miles of railroad in said county of Mercer, but this line of railroad did not reach the other or another line or boundary of the county by about two miles from the nearest point." This finding seems to conclusively settle the question that the railroad company did not construct its railroad "through" the county. The requirement was that the road should be completed through the county, not through the county to Harrodsburg, or to Burgin, or to a junction with the Cincinnati Southern railroad, but through the county entirely—that is, from one side or line to the opposite or another side or line. If the legislature had used the very common preposition "through" in any limited or unusual sense it would appear in the context. That it was used with its ordinary meaning of "from one side to the opposite side," or another side, or "from one surface or limit to the other surface or limit," seems to us very plain from the whole tenor of the statute. That it was not used in the sense of "to" and "into" is plain, from the proviso of the same act, which brings the preposition- "to" and "through" into apposition, in the provision that "the subscription should not be binding," "unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The argument that this was a substantial compliance with the condition does not meet with our assent; the object of the act was to secure to Mercer county a railroad entirely through the county. To build to within two miles of the statutory requirement is not a substantial fulfillment of the provision. Whether this was an important or unimportant matter, it is not for us to say. The legislature had the undoubted authority to impose this condition, or any other it saw fit. Whether wisely or unwisely, the power to issue any bonds was made dependent on the performance of this condition.

The provisions that they should not be valid until the performance of this condition, and that the stakeholder should not
56 deliver them until this railroad should be constructed through the county are imperative, and limit the power of the county and of this trustee to the issuance of bonds only when the requisite facts actually existed. These restrictions were intended to secure the actual completion of the railroad and guard against the possible misapplication of the bonds to purposes not designed. Restrictions in acts of this kind intended to guard the public from the negligence or crimes of their officials, and to secure exact compliance with the

THROUGH POOR COPY

terms upon which the power of taxation may be exercised in aid of railroad construction, are entitled to favorable consideration.

The utterances of the Supreme Court upon the effect of restrictions and limitations in such legislation have been uniform and announce a wise public policy. In Barnum *vs.* Okolona, 148 U. S., 393, Mr. Justice Shiras for the court said:

"That municipal corporations have no power to issue bonds in aid of railroads except by legislative permission; that the legislature in granting permission to a municipality to issue its bonds in aid of a railroad may impose such conditions as it may choose, and that such legislative permission does not carry with it authority to execute negotiable bonds except subject to the restrictions and conditions of the enabling act, are propositions so well settled by frequent decisions of this court that we need not pause to consider them. Cheboygan County *vs.* Parker, 3 Wall., 93–96; Wells *vs.* Supervisors, 102 U. S., 625; Claiborne County *vs.* Brooks, 111 U. S., 400; Young *vs.* Clarendon Township, 132 U. S., 340–346."

In Barnett *vs.* Dennison, 145 U. S., 139, Mr. Justice Brown, in delivering the opinion of the court, said:

"The provision of the statute authorizing them must be strictly pursued, and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued."

The conclusion we reach is that this condition has not been complied with, and that the trustee in delivering these bonds did so in violation of his duty and acted without authority of law.

This brings us to the consideration of the question as to whether the county is estopped to make this defence. The learned trial judge found as a fact that the appellee bought in open market, for value, and with no actual knowledge that the conditions imposed by the enabling act had been in any way unperformed.

That such a municipal corporation had no general authority to issue such negotiable securities, and that the purchaser is
57 chargeable with notice of the terms, conditions, and requirements of the permissive statutes under which they purport to be issued is well settled.

Marsh *v.* Fulton County, 10 Wall., 676.
McClure *v.* Township of Oxford, 94 U. S., 429.
Northern Bank *v.* Porter Township, 110 U. S., 609.
Barnett *v.* Dennison, 145 U. S., 139.
Barnum *v.* Okolona, 148 U. S., 395.
Citizens' Ass'n *v.* Perry County, 156 U. S., 701.

First, it is said that the recital in these bonds imports a compliance with all the restrictions and conditions of the enabling act and that these recitals cannot be contradicted. The recital in the bond is that it was "issued pursuant to the authority conferred upon the said county by an act of the legislature of Kentucky, entitled 'An act to authorize the County of Mercer to subscribe aid to the Louisville Southern Railroad Company,' approved May 15, 1886." Looking to the act referred to, as the purchaser was bound to do, he discovered that these bonds were to be executed and deposited in escrow and delivered only upon the completion of the Louisville Southern railroad "through" the county of Mercer. By this provision he was advised that the recital that the bond "was issued pursuant to the authority" of the act referred to was a recital which in the nature of things could only refer to facts antecedent to the deposit of the bonds in escrow, and could not possibly operate as a recital covering the subsequent completion of the railroad through the county. The enabling act operated as notice to him that the bonds were not "binding and valid obligations" when placed in escrow, and would not become valid and legal securities "until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same." The purchaser therefore bought with notice that the depositary held the bonds "in escrow," and had no power to deliver them until the company should "become entitled to the same by the construction of its road through the county." The recitals in the bonds must therefore be referred to the acts which, under the permissive law, were to precede the execution and deposit of the bonds in escrow, and do not operate as a recital of facts which could not have existed when they were made.

Where recitals are relied upon to cut off the defence that municipal bonds are in fact issued without authority of law or in violation of law, they should be fairly and reasonably construed and be such as to clearly indicate that the conditions and requisites of the law had been complied with.

58 Risley *v.* Village of Howell, 64 Fed. Rpt., 453.
Northern Bank *v.* Porter Township, 110 U. S., 618–619.
School District *v.* Stone, 106 U. S., 183–187.

In the case last cited, Mr. Justice Harlan, for the court, concerning the construction of words in a bond claimed to operate as a recital estopping a municipality from showing that the bonds had been issued in violation of law, said:

"Numerous cases have been determined in this court in which

THROUGH POOR COPY

we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of,' the statute, have been held, in favor of *bona fide* purchasers of value, to comport full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. But in all such cases, as a careful examination would show, the recitals fairly import a compliance, in all substantial respects, with the statute giving authority to issue the bonds. We are unwilling to enlarge or extend the rule, now established by numerous decisions. Sound policy forbids it. Where the holder relies for protection upon mere recitals, they should at least be clear and unambiguous, in order to estop a municipal corporation, in whose name such bonds have been made, from showing that they were issued in violation, or without the authority of law."

There is, therefore, no estoppel by recital, because there is no statement in the bonds implying that the Louisville Southern railroad had been completed "through" the county, as required by the provisions of the enabling act.

Buchanan *v.* Litchfield, 102 U. S., 278.
Carroll County *v.* Smith, 111 U. S., 561–2.
Lake County *v.* Graham, 130 U. S., 674.
Citizens' Ass'n *v.* Perry County, 156 U. S., 692–701.

We have then to deal with bonds which contain no recital whatever, implying that the most important of the conditions precedent, specified in the enabling act upon which the power to issue them depended, had been performed. In this respect the
59 case is distinguished from cases where the recitals were such as to imply compliance with all precedent conditions; such as that they had been "issued pursuant" to a particular act, as in Knox County *v.* Aspinwall, 2 How., 540, or "by virtue of the law of the State, entitled an act," etc., as in Insurance Co. *v.* Bruce, 105 U. S., 328, or "under and in pursuance of an act," etc., as in Lewis *v.* Commissioners, 105 U. S., 739, or "under authority of an act," etc., as in Oregon *v.* Jennings, 119 U. S., 74.

BLEED.

This court, in Cadillac *v.* Woonsocket, 16 U. S. A., 545, held, that under an act authorizing the issuance of new bonds "to extend the time of payment of old bonds falling due," a recital that a bond was issued "for the purpose of extending the time of payment of bonds falling due," estopped the city from showing that the bonds thus refunded were void bonds. So in Risley *v.* Village of Howell, 12 C. C. A., 218, the bonds recited that they were issued under an act approved February 25, 1885, which act authorized the issuance of bonds "to raise money to make public improvements," it was held that it was not a defence to show that in fact the money obtained for the bonds had been expended under an ordinance, referred to in the bonds, for a purpose not a "public improvement," within the decisions of the supreme court of the State.

On the contrary, the case falls distinctly within another class of cases where the bonds either contained no recitals or the recitals were made by one not intrusted with the duty of ascertaining and determining the facts recited.

Dixon County *v.* Fields, 111 U. S., 83.
German Bank *v.* Franklin, 128 U. S., 526.
Barnett *v.* Dennison, 145 U. S., 139.
Citizens' Ass'n *v.* Perry County, 156 U. S., 701.

But it is argued that the Kentucky enabling act is peculiar, and that the absence of recitals in bonds issued thereunder is immaterial, inasmuch as the circumstances attending the execution of these bonds were such as that there could be no recitals, on the face of the bonds, importing performance of conditions which were to be complied with after their formal execution and deposit in escrow. This was the view entertained by Judge Barr, who, upon this ground, held that the decision of the trustee before delivering them to the railroad company, that all precedent conditions had been complied with, precluded the county from contradicting that decision after the bonds had passed into the hands of innocent purchasers. To support this position it is necessary to construe this enabling
60 act as not only empowering the trustee to ascertain and determine whether all conditions subsequent to such deposit had been performed, but that such determination should estop the county as against an innocent purchaser of the bonds, although no such determination appeared on the bond either through a recital or endorsement. Certainly none of the numerous opinions of the Supreme Court affords any express authority for such an interpretation of this act. A careful examination of the opinions of that court will, it is confidently believed, show that where railroad con-

THROUGH POOR COPY

struction bonds have been issued in violation of the law under which authority was granted, the municipality has never been held estopped to defend upon that ground, unless representations appeared on the bonds themselves importing full compliance with the conditions imposed by the enabling act. The estoppel has been a consequence of recitals or endorsements made by officials empowered to decide the facts recited, and which a purchaser was authorized to rely upon as speaking the truth. The rule which we deduce from the long line of the decisions made by that court as to the application of the doctrine of estoppel to municipal bonds is, that where bonds are issued by a municipal corporation under a special and limited authority imposing restrictions and conditions, but authorizing officials of such municipality to execute and issue such bonds when the conditions precedent imposed have been complied with, and it can fairly and reasonably be gathered from the act that the officials so authorized to execute the bonds were also empowered to ascertain and determine that the requisite facts and circumstances did exist, or all conditions precedent had been complied with; and — this determination or decision has been embodied in the recitals of the bonds, a purchaser without other notice, and for value, would have a right to rely upon the truth of the representations appearing on the bond- and need make no further inquiry.

Colona *vs.* Eaves, 92 U. S., 484.
Dixon County *vs.* Fields, 111 U. S., 93.
German Bank *vs.* Franklin County, 128 U. S., 526.
Citizens' Ass'n *vs.* Perry County, 156 U. S., 701.

The principle is that when the bonds on their face affirmatively import a compliance with the conditions upon which they might lawfully issue, a defence, based upon a contradiction of the recitals thus made by an official empowered by the law to decide the facts recited, will not be permitted when the bond has come to the hands of a *bona fide* holder for value. This doctrine does not apply as between a railroad company receiving such bonds in violation
61 of law and the municipality itself; nor has it ever been applied in favor of a holder who was not an innocent purchaser for value.

Dillon on Municipal Corp., sec. 519.
Chambers County *vs.* Clews, 21 Wall., 317–321.

False recitals have never been held conclusive as between the original parties or in favor of purchasers with notice, for the obvious reason that an essential element to an estoppel *in pais* is that the

representation should mislead and deceive one who had a right to rely upon the truth of the representation. It would seem to follow, from the reasons upon which an estoppel is said to arise, that if bonds are issued with recitals, but in violation of law or authority, there exists no reason why they should not be open to defence when action is brought, even by one who bought without actual knowledge that they had been issued without performance of precedent conditions. In such case the purchaser buys at his peril, and cannot rely upon his mere ignorance, nor upon the mere fact that the bonds had been issued and were found in circulation.

Marsh *vs.* Fulton County, 10 Wall., 644.
Buchanan *vs.* Litchfield, 102 U. S., 278.
Merchants' Bank *vs.* Bergin County, 115 U. S., 384.
Davies County *vs.* Dickinson, 117 U. S., 637.
German Bank *vs.* Franklin County, 128 U. S., 526.
Carroll County *vs.* Smith, 111 U. S., 556.
Chambers County *vs.* Clews, 21 Wall., 317–321.
Citizen's Ass'n *vs.* Perry County, 156 U. S., 701.
Barnett *vs.* Dennison, 145 U. S., 135.

The mere fact that the bonds have been issued and are in form negotiable securities, if entitled to any significance whatever, would only raise a presumption that they had been delivered to the railroad company by the trustee in compliance with the terms of the law. Such a presumption would not be conclusive and the county would not be estopped, even as against one who bought in actual ignorance of the true facts. This seems to be the well-settled rule established by Buchanan *vs.* Litchfield; Davies County *vs.* Dickinson; German Bank *vs.* Franklin County, and Citizens' Ass'n *vs.* Perry County, heretofore cited.

In the case last cited this precise point was urged. Justice Harlan, for a unanimous court, in answer said:

"But it is urged that the bonds having been executed and issued by those whose duty it was to execute and issue them, whenever that could be rightfully done, the county is estopped to plead their invalidity as between it and a *bona fide* purchaser for value.
62 This argument would have force if the material circumstances bringing the bonds within the authority given by law were recited in them. In such a case, according to the settled doctrines of this court, the county would be estopped to deny the truth of the recital as against *bona fide* holders for value. But this court, in Buchanan *vs.* Litchfield, 102 U. S., 278–292, upon full consideration, held that the mere fact that the bonds were issued, without any re-

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cital of the circumstances bringing them within the power granted, was not in itself conclusive proof in favor of a *bona fide* holder, that the circumstances existed which authorized them to be issued."

Does the act under which these bonds were issued so far depart from the statutes construed in the cases cited as to warrant us in holding that a purchaser need make no further inquiry than would lead him to information that the trustee had made such a decision as that found by the circuit court, and that if he buys without any inquiry, that he is only obliged to prove by evidence extraneous to the bond that such a decision was in fact made? Unless this act can be construed as making the power of the county to issue these bonds dependent, not on the actual construction of this railroad through the county, but upon the decision of this trustee that it had been so constructed, the whole foundation for the argument disappears. This is the test to be applied to every case, even where recitals are relied upon to defeat a defence.

In the leading case of Dixon *v.* Field, 111 U. S., 93, the rule for construction of such enabling act is thus stated by Mr. Justice Matthews:

"But it still remains that there must be authority vested in the officers, by law, as to each necessary fact, whether enumerated or non-enumerated, to ascertain and determine its existence, and to guarantee to those dealing with them the truth and conclusiveness of their admissions. In such a case the meaning of the law granting power to issue bonds is, that they may be issued, not upon the existence of certain facts, to be ascertained and determined whenever disputed, but upon the ascertainment and determination of their existence, by the officers or body designated by law to issue the bonds upon such a contingency. This becomes very plain when we suppose the case of such a power granted to issue bonds, upon the existence of a state of facts to be ascertained and determined by some persons or tribunal other than those authorized to issue the bonds. In that case, it would not be contended that a recital
63 of the facts in the instrument itself, contrary to the finding of those charged by law with that duty, would have any legal effect."

It is to be observed at the outset that it is significant that while the act provides in very plain language that the requisite facts antecedent to the preparation and deposit of the bonds with the trustee shall be ascertained and determined by the county judge, that no such explicit statement is found regarding the determination of the subsequent precedent conditions by this trustee. If he is empowered

to make any determination whatever, the power is only inferentially granted. So it is significant that no provision is found requiring an endorsement of such decision on the bonds, or the making of some other permanent record that so grave a determination had been made. The very failure to provide in clear terms for a determination by this trustee of the existence of conditions which could only arise after the county judge had parted with the bonds and lost all control over them, and to provide for some method of certifying that determination affords a strong presumption against the interpretation now contended for. Especially is this noticeable in view of the very well-defined distinction between bonds with and without recitals. But it is said that the act authorizing the making of "negotiable bonds," and that it ought not to be presumed that the legislature intended that "negotiable bonds" should be forever open to the defence that the railroad had never been completed as required by the act, and that we ought therefore to infer that the trustee was authorized to decide as to whether that had been a compliance with this condition, and that his decision should be conclusive.

Undoubtedly the commercial value of such bonds would be much improved if the mere fact of their issuance should, in favor of innocent holders, be conclusive evidence of both the authority to issue them and the regularity of the exercise of that power. This, however, is not the law. If the legislature by providing that these bonds should be negotiable meant to cut off all defences by the decision of the county judge as to facts antecedent to the deposit in escrow, and by the decision of the trustee as to all facts subsequent to such deposit, it is most remarkable that it did not provide for some endorsement of that decision on the bonds. As it is, the fact that he ever made such a decision depends upon evidence *in pais*, and is subject to all the dangers of such evidence. The argument based on the inconvenience of making proof in every action on such bonds of the fact of the completion of the railroad amounts to little in ar-
64 riving at the meaning of this act, if the litigant in such a suit is driven to make proof of a decision by the trustee by evidence equally difficult to preserve. But this provision authorizing the issuance of "negotiable bonds" must not be construed alone, nor merely in connection with the provision that the trustee should deliver them when the railroad was completed. There are many considerations which lead us to the conclusion that while it was undoubtedly the duty of this custodian to inform himself as to the existence of the facts which would justify him in making a delivery of these bonds, yet that information was only for the purpose of en-

HROUGH POOR COPY

abling him to prudently discharge his duty and protect himself and the parties interested from the consequence of an illegal and unauthorized delivery. The power of this depositary to receive, hold, and deliver these bonds came from the enabling act alone. He was not constituted the agent of either the railroad company or the county, though he was designated by an order of the county judge. This depositary need not have been a person at all. A corporate trust company might have been designated. Neither residence, citizenship, nor interest in or knowledge of the locality was essential to the competency of the appointee. The relation, therefore, that this depositary bore to the county is not of such a character as to lead to the presumption that it was intended that he should conclude the county through any agency for or relation to it. The bonds were not to be "delivered" to him, but "deposited" with him. Delivery is just as essential to the existence of a bond, note, or other negotiable instrument as it is to a deed.

1 Dan. Negotiable Instruments, sec. 63 *et seq.*

Young *v.* Clarendon Township, 132 U. S., 353.

Though they had been prepared and signed they were absolute nullities until delivered, and they could not take effect as bonds until an authorized delivery. When prepared and signed by the county judge and clerk and sealed the power of these officials ceased. They could not perfect them by delivery, because the statute gave them no such power. What the county judge then did was to deposit them with the depositary provided under the statute. This was not a delivery, and the bonds continued imperfect obligations until a delivery, which could only be made by the custodian when the railroad was completed. The power to perfect them as bonds arose only when the condition mentioned had been performed. A delivery before the railroad was begun would not have completed the making of these bonds, for the power was to deliver them when it was
65 finished, and the act itself provided expressly that until then the bonds should not be valid, thus affirming the imperfect character of the bonds until a delivery was lawfully made.

Young *v.* Clarendon Township, cited above.

The imperfect character of the bonds until the condition precedent had been performed is further made manifest by the direction of the act that they should "be held in escrow and delivered to the said railroad company when it shall become entitled to them by the construction of its road through such county." This term, "in escrow," is one strictly applicable to deeds; and a direction that such imperfect obligations, executed subject to conditions and restrictions, by a

maker having no general authority to issue such paper, should be held in escrow, implies that the term was used just as it would be used if the subject-matter of the deposit was a deed. As used, the term implied the state or condition of a deed conditionally held by a third person, to be delivered and to take effect upon the happening of a condition.

Bouvier's Law Dictionary.
Black's Law Dictionary.

When a deed is delivered as an escrow, nothing passes by the deed unless the condition is performed.

Calhoun *v.* Emigrant Comp., 93 U. S., 124.
6 Am. and Eng. Ency., 867.
Taylor *v.* Craig, 2 J. J. M. (Ky.), 449.

Counsel have very ably argued that a distinction exists between the effect of a delivery in violation of the conditions where the thing in escrow was negotiable paper and has come to the hands of an innocent purchaser without notice and for value.

1 Dan. Neg. Instruments, secs. 68, 855, 856.
Taylor *v.* Craig, 2 J. J. M. (Ky.), 449.

Possibly such distinction is sound, though if the purchaser bought with notice that the paper had been held in escrow, and that the trustee had no power to deliver until a condition had arisen, of which the purchaser likewise had notice, he could hardly be regarded as a *bona fide* holder. Every one dealing with an agent assumes all the risk of a lack of authority in the agent to do what he does. Negotiable paper is no more protected against this inquiry than any other. The purchaser of these bonds bought with notice that they had been held in escrow. The authority of the custodian was not a secret. Herein is the distinction between this case and that class of cases where paper is fraudulently issued by an agent who is authorized to make and issue negotiable paper in the business of his prin-
66 cipal, and the question whether the paper issued is in the business of the principal is peculiarly within the knowledge of the agent and not known to the world or a stranger. In such cases the agent is impliedly authorized to represent the existence of the fact upon which his agency depends. Farmers' National Bank *vs.* Sutton Mfg. Co., 6 U. S. App., 312, 332. It is difficult to see why one who takes such bonds as those in suit is not just as much obliged to look to the authority of the trustee to deliver as if the subject of the escrow had been a deed. We are to remember that these bonds were imperfect obligations, there having been no "delivery" when

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placed in escrow. The question first presented to an intending buyer is this: Have these bonds become executed, valid obligations by delivery?

The authority of this trustee to make delivery depended upon the same principles that determine such authority in other contracts, "and is not aided by the doctrine that, when once lawfully made, negotiable paper has a more liberal protection than other contracts in the hands of innocent holders."

The Floyd Acceptances, 74 U. S., 666–680.

"The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder."

Marsh *v.* Fulton County, 77 U. S., 683.

But aside from any distinction between the effect of a wrongful delivery of a deed and of commercial paper upon the title of an innocent purchaser, it seems very clear that the express declaration of the fourth section of the act that these bonds should not be valid obligations until the railroad had been completed through the county, and by the further provision that they should be held in escrow until that event, settles conclusively that the legislature did not mean that the power of the county to so obligate itself should depend upon the mere opinion of the custodian, but upon the actual objective existence of the requisite fact. The whole scope and tenor of the act leads to the conclusion that the legislature intended to protect the county against any misapplication of these bonds, and therefore limited its power so that the bonds only became its obligations when the contract between the railroad company and the county should become complete.

The machinery devised indicates that the purpose was that the railroad should not part with its stock certificates until it had received payment therefor. And to secure the county against failure to complete the road, all power to issue bonds was made de-
67 pendent upon its actual construction. To secure the railroad in obtaining the bonds when actually earned, it was provided that when a favorable vote had been cast and the subscription made the bonds should be prepared and formally executed and placed in the hands of a stakeholder, to be delivered when the railroad company had performed its agreement. To secure the county against the possible breach of duty by this custodian, his holding was to be in escrow, and his power to deliver withheld until the actual performance of all precedent conditions. To further protect the county against an unauthorized delivery of the bonds, the act in plain terms provided that they should not be valid obligations until the comple-

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tion of the road. That the custodian was required to give a bond for the due discharge of his trust by no means implies that the county was to look to this bond in case of an unauthorized delivery. The bond was no more for the benefit of one party than the other. A wrongful delivery or a fraudulent use of them might, irrespective of a defence if sued upon the bonds, involve a costly litigation. It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement or any wilful refusal to faithfully perform the trust.

It is next insisted that the county should be held responsible upon the principle that whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This principle can have no application here, for two reasons: first, the holders of these bonds cannot be regarded as innocent purchasers, inasmuch as they are constructively chargeable with all that inquiry would have disclosed; and, second, the bonds, as bonds of a municipal corporation, are invalid for want of power to issue them until the actual completion of the railroad in whose aid they were authorized. Neither are the bonds validated because of the payment of interest for a time after their issuance. The question here is not one of mere irregularity in the method of exercising a power. The defence presented goes to the power of the county. There was no authority to issue bonds in aid of the railroad until the road had been constructed through the county. That condition having never been complied with, neither the county court nor the county judge could, by any act of omission or commission, waive its performance. Neither could the county court or any of the county officials validate them by subsequent acts of ratification. If the power to issue them did not exist when they were issued, no payment of interest or resolution to adopt them can operate to make them valid contracts. Ratification can only be effective when the party ratifying possesses the power to perform the act ratified.

68–86

Marsh *v.* Fulton County, 77 U. S., 676–684.

Norton *v.* Shelby County, 118 U. S., 425–451.

In Doon Township *v.* Cummins, 142 U. S., 366–376, the court, through Mr. Justice Gray, said:

"A ratification can have no greater effect than a previous authority; and debts which neither the district nor its officers had any power to authorize or create cannot be ratified or validated by either of them, by the payment of interest or otherwise."

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That the county still holds the railroad stock received when these bonds were delivered is no reason for holding these bonds valid. By proper proceedings the railroad can recover this stock or compel payment for its value. Justice would demand the return of the stock or compensation for its value. No such question exists in this case.

Norton *v.* Shelby County, 118 U. S., 454.

The judgment must be reversed and remanded, with direction to render judgment in accordance with this opinion.

(A petition for a rehearing (which is omitted per stipulation) was duly filed, which was, on May 25th, 1896, denied without an opinion.)

87 [Endorsed:] Case No. 16,401. Supreme Court U. S., October term, 1897. Term No., 243. The County of Mercer, in the State of Kentucky, P. E., *vs.* The Provident Life & Trust Company of Philadelphia. Agreed record. Filed July 8, 1897.

88 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the sixth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The County of Mercer, in the State of Kentucky, is plaintiff in error and The Provident Life and Trust Company of Philadelphia is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Kentucky, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

89 do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

BLEED

THE UNITED STATES OF AMERICA, }
Sixth Judicial Circuit. }

I hereby make return of the within writ, pursuant to a stipulation of counsel filed in this court this 24th day of October, 1896; which stipulation is in the following words:

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, Plaintiff in Error,
vs.
THE PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA, Defendant in Error.
} No. 326 of October Term, 1895.

Stipulation.

A writ of certiorari having been granted on October 20th, 1896, by the Supreme Court of the United States, directed to the honorable judges of the United States circuit court of appeals for the sixth circuit, commanding them to send without delay to the said Supreme Court the record and proceedings in the above-styled cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done: Now it is stipulated and agreed by and between the County of Mercer, in the State of Kentucky, by Alexander Pope Humphrey, its counsel, and the Provident Life & Trust Co. of Philadelphia, by Thomas W. Bullitt, its counsel, as follows, to wit:

That the certified copy of the transcript of the record and proceedings in the above-styled cause in said circuit court of appeals, which is now on file in the said Supreme Court of the United States with the petition of the Provident Life & Trust Co. of Philadelphia for said writ of certiorari, may be taken and considered as a return to the said writ.

October 23rd, 1896.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY,
By ALEXANDER POPE HUMPHREY,
Counsel for Plaintiff in Error.
THE PROVIDENT LIFE & TRUST CO. OF PHILADELPHIA,
By THOMAS W. BULLITT,
Counsel for Defendant in Error.

THROUGH POOR COPY

Done at Cincinnati, O., this 24th day of October, 1896.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk U. S. Circuit Court of Appeals for the Sixth Circuit.

90 [Endorsed:] 16,401. Supreme Court of the United States. No. 243. October term, 1897. The County of Mercer, Kentucky, *vs.* The Provident Life & Trust Co. of Phila. Writ of certiorari and return. Filed Oct. 26, 1896.

IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1895.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - *Plaintiff in Error.*

VERSUS [No. 326.]

THE PROVIDENT LIFE AND TRUST COMPANY, OF PHILADELPHIA, - *Defendant in Error.*

NOTICE.

Notice is hereby given that upon the verified petition of the Provident Life and Trust Company of Philadelphia, defendant in error in the above cause, and upon all the pleadings and proceedings herein, we shall on Monday the 12th day of October, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is herewith served upon you) to the Supreme Court of the United States at the Capitol, in the city of Washington, D. C.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Of Counsel for the Provident Life and Trust Company, of Philadelphia.

The foregoing notice is hereby accepted this 14th day of September, 1896.

THE COUNTY OF MERCER IN THE STATE OF KENTUCKY.
BY ALEXANDER POPE HUMPHREY,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

MOTION.

And now comes the Provident Life and Trust Company of Philadelphia, by Samuel Dickson and Thomas W. Bullitt, its counsel, and moves this Honorable Court that it shall by *Certiorari* or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the County of Mercer, in the State of Kentucky, was plaintiff in error and the Provident Life and Trust Company of Philadelphia was defendant in error, and to that end now tenders herewith its petition together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Counsel for Provident Life and Trust Company of Philadelphia.

BLEED.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

PETITION.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE WRIT OF ERROR TAKEN BY THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, V. THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, A CORPORATION OF THE STATE OF PENNSYLVANIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of the Provident Life and Trust Company of Philadelphia, respectfully represents as follows:

First. Your petitioner is a corporation of the State of Pennsylvania, and the County of Mercer is a county in the State of Kentucky.

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Second. An action was brought by your petitioner in the Circuit Court of the United States for the District of Kentucky at Louisville, upon the coupons annexed to $100,000 of bonds issued by the County of Mercer. The case was heard (under a stipulation waiving a jury) before the Hon. JOHN W. BARR as Circuit Judge, who made a special finding of facts, which is at pp. 17–36 of the copy of the record herewith filed; and upon the facts so found gave judgment against the County of Mercer as prayed in the petition. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

Third. The case having been heard before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge, the opinion of the Court was delivered on March 3, 1896, by LURTON, C. J., reversing the judgment of the lower court upon the ground that the bonds were void. (R., pp. 49–68). A petition for a rehearing or for a certificate to the Supreme Court was duly filed (Rec. pp. 69–85); and was denied without an opinion. (Rec. p. 86.)

BLEED.

Fourth. The County of Mercer subscribed to the capital stock of the Louisville Southern Railroad Company in pursuance of an Act of the General Assembly of the State of Kentucky, as follows:

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascer-

THROUGH POOR COPY

tain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to

receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

An election was duly held and pursuant to the authority given the County subscribed for $125,000 of the capital stock of the Railroad Company, and caused 125 bonds to be executed in the following form:

HROUGH POOR COPY

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and *pursuant to an order* entered by the county judge of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"*County Judge.*

"Attest:

"BEN. C. ALLIN,

"*Clerk.*"

Fifth. These bonds were deposited (in accordance with the provisions of the fourth section of the Act) with a trustee who duly

THROUGH POOR COPY

gave bond in manner and form as required by the Act. (Rec. p. 24.)

The railroad was not completed from one line of the county through to another or opposite line, but was completed through the county about twenty miles to a point where a junction was made with the Cincinnati Southern R. R. Co., approaching within two miles of the opposite county line. (Rec. p. 29.)

Sixth. A question having arisen as to whether the road should be built from one county line to the opposite one, the railroad company prepared to extend its road to Danville in Boyle County, and acquired the right of way to the Boyle County line. The citizens of Mercer County were violently opposed to the road being extended to Danville, which was a rival town. The matter was publicly and generally discussed and a movement made to have the County Court instruct the trustee to deliver the bonds. (Rec. pp. 29-30.)

After full argument, the County Court, composed of the County Judge and the magistrates of the county, while disclaiming the right to

order the trustee to deliver the bonds, by an unanimous vote entered an order expressing the opinion that the bonds should be delivered by the trustee and the construction of the railroad not forced to the Boyle County line and to Danville. This order was spread upon the county records. (Rec. pp. 30-31.)

Seventh. The trustee *decided* that all the conditions precedent had been performed by the railroad company, to wit: that the railroad had been so completed through the county that a train of cars had passed over the same within the time limited by the subscription contract. He delivered $105,000 of the bonds in the presence of the County Judge, who cut off and destroyed the past due coupons and received a certificate for $105,000 of the capital stock of the railroad company. (Rec. pp. 30, 31.)

Eighth. The county continually voted said stock, now holds the same, and has never tendered its return. The county regularly paid the coupons until the expiration of the time (allowed by the contract of subscription) within

which the road was to be completed through the county. (Rec. pp. 31, 32.)

Your petitioner bought the bonds and paid par and accrued interest therefor ($101,197.22) to a prior purchaser in the city of Philadelphia; and, as specially found by the lower court, is a *bona fide* purchaser without notice of any defect in or defense to the said bonds. (Rec. p. 35.)

Ninth. The Circuit Court of Appeals held the bonds to be void because the railroad was not completed from one county line entirely through to the opposite county line. (Rec. pp. 55, 56.)

It held that the county of Mercer was not estopped to contest the validity of the bonds even in the hands of a *bona fide* holder, *because*,

1. The trustee had no power to *decide* any thing as to the performance of the conditions precedent; but each purchaser of the bonds was bound to find out at his peril the physical fact whether the road had been completed through the county, and whether a train of cars had passed over the same *prior to a certain day*. (Rec. p. 63.)

2. That even if the Act be construed as vesting the trustee with the power to decide as to the performance of the conditions precedent, the decision of the trustee in the present case is ineffectual because it is not recited in or *endorsed* on the bonds. (Rec. p. 60.)

Although the bonds recited that they had "been issued pursuant to the authority conferred upon the said county by an Act, etc.," and the county consented and urged that they be delivered with such a recital, the Circuit Court of Appeals held that the county was not thereby estopped to defend against even a *bona fide* holder; nor estopped by the payment of interest, nor by lying by till the time for completion had expired, nor by the holding and voting of the shares of stock received for the bonds. (Rec. pp. 67, 68.)

Your petitioner respectfully represents:

1. The decision of the Circuit Court of Appeals involves the validity of a very large class of securities which have been given currency in the markets of the world,

almost entirely by the decisions of this Court, and such securities, in this and other circuits, are profoundly and most injuriously affected by the decision complained of.

2. The amount involved in this controversy is large, viz., $100,000 of municipal bonds (with several years' accrued interest) purchased, at par, on the faith of the decisions of this Court, and will be a total loss under the decision of the Circuit Court of Appeals.

3. The decision is, in fundamental particulars, a distinct departure from a course of decision now firmly settled by this Court with reference to the construction of statutes authorizing the issue of "negotiable" municipal bonds.

4. It rests upon principles so clearly and so deeply in conflict with the decisions of this Court, that if permitted to become final and followed in other circuits, vast lines of securities now deemed perfectly safe must be declared void; confidence in municipal bonds as an investment will be destroyed, and great losses must be borne by persons who have

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invested on the faith of the decisions of this Court.

5. The statute authorizes the issue of "negotiable" bonds upon the performance of certain conditions precedent, which are matters not of record, but purely *in pais*.

That can not be a reasonable or just construction of such an Act, which holds that, in no way, and at no time, can the bonds so authorized ever in fact become negotiable; but that such bonds are, by the requirements of the Act itself, to be subject to contest until maturity, although purchased in good faith, in open market, for full value, after delivery made in good faith in the presence of the county officials, by the custodian designated by the Act to make delivery and required to give bond for the faithful performance of this very duty. Yet such is the effect of the opinion complained of.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the

ED. THROUGH POOR COPY

Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled County of Mercer, in the State of Kentucky, plaintiff in error, v. Provident Life and Trust Company of Philadelphia, defendant in error, No. 326, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And so your petitioner will ever pray.

SAMUEL DICKSON,

THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company of Philadelphia, Petitioner.

STATE OF KENTUCKY, }
COUNTY OF JEFFERSON, } ss.

Thomas W. Bullitt, being duly sworn, states that he is one of the counsel for the Provident Life and Trust Company of Philadelphia, the petitioner above named, that he has read the foregoing petition, and that the facts therein stated are true.

THOMAS W. BULLITT.

Subscribed and sworn to before me this 22d day of September, 1896.

WILLIAM MARSHALL BULLITT,

[SEAL] *Notary Public in and for the County of Jefferson, State of Kentucky.*

My commission expires February 4, 1900.

BLEED. THROUGH POOR COPY

No. 622. 243.

Brief of Dickson & Bullitt for P. C. (Def'ts)

Filed Oct. 12, 1896.

Office Supreme Court, U. S.
FILED.
OCT 12 1896
JAMES H. MCKENNEY,
CLERK

MERCER COUNTY BOND CASE.

Supreme Court of the United States

OCTOBER TERM, 1896.

EX-PARTE

The Provident Life and Trust Company, of Philadelphia,

PETITIONER.

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF IN SUPPORT OF THE PETITION.

SAMUEL DICKSON,
THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company, of Philadelphia, Petitioner.

INDEX.

PAGE

1. **Notice,** 1
2. **Motion,** 2
3. **Petition,** 3–17
4. **Brief,** 18–68
   - *a.* Rules of Statutory Construction, ... 21–25
   - *b.* Decision of the Circuit Court of Appeals, 25–27
   - *c.* The trustee was invested with power to decide as to the performance of conditions precedent, ... 28–36
   - *d.* Effect of the word "in escrow," 37–45
   - *e.* The decision of the trustee was conclusive although not endorsed on the bonds, ... 46–58
   - *f.* The county is estopped by its conduct, . 59–67
5. **Appendix** (*nature of the conditions precedent*), 69–74

IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

OCTOBER TERM, 1895.

THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, - - - - *Plaintiff in Error.*

VERSUS [No. 326.]

THE PROVIDENT LIFE AND TRUST COMPANY, OF PHILADELPHIA, - *Defendant in Error.*

NOTICE.

Notice is hereby given that upon the verified petition of the Provident Life and Trust Company of Philadelphia, defendant in error in the above cause, and upon all the pleadings and proceedings herein, we shall on Monday the 12th day of October, 1896, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit a motion (a copy of which is herewith served upon you) to the Supreme Court of the United States at the Capitol, in the city of Washington, D. C.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Of Counsel for the Provident Life and Trust Company, of Philadelphia.

The foregoing notice is hereby accepted this 14th day of September, 1896.

THE COUNTY OF MERCER IN THE STATE OF KENTUCKY.
BY ALEXANDER POPE HUMPHREY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

MOTION.

And now comes the Provident Life and Trust Company of Philadelphia, by Samuel Dickson and Thomas W. Bullitt, its counsel, and moves this Honorable Court that it shall by *Certiorari* or other proper process directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, require said Court to certify to this Court for its review and determination a certain cause in said Court of Appeals lately pending, wherein the County of Mercer, in the State of Kentucky, was plaintiff in error and the Provident Life and Trust Company of Philadelphia was defendant in error, and to that end now tenders herewith its petition together with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

SAMUEL DICKSON,
THOMAS W. BULLITT,
Counsel for Provident Life and Trust Company of Philadelphia.

BLEED. THROUGH POOR COPY

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

Ex Parte—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA.

PETITION.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES, FOR ITS REVISION AND DETERMINATION, THE WRIT OF ERROR TAKEN BY THE COUNTY OF MERCER, IN THE STATE OF KENTUCKY, V. THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, A CORPORATION OF THE STATE OF PENNSYLVANIA.

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The petition of the Provident Life and Trust Company of Philadelphia, respectfully represents as follows:

First. Your petitioner is a corporation of the State of Pennsylvania, and the County of Mercer is a county in the State of Kentucky.

Second. An action was brought by your petitioner in the Circuit Court of the United States for the District of Kentucky at Louisville, upon the coupons annexed to $100,000 of bonds issued by the County of Mercer. The case was heard (under a stipulation waiving a jury) before the Hon. JOHN W. BARR as Circuit Judge, who made a special finding of facts, which is at pp. 17–36 of the copy of the record herewith filed; and upon the facts so found gave judgment against the County of Mercer as prayed in the petition. From this judgment a writ of error was taken to the United States Circuit Court of Appeals for the Sixth Circuit.

Third. The case having been heard before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge, the opinion of the Court was delivered on March 3, 1896, by LURTON, C. J., reversing the judgment of the lower court upon the ground that the bonds were void. (R., pp. 49–68). A petition for a rehearing or for a certificate to the Supreme Court was duly filed (Rec. pp. 69–85); and was denied without an opinion. (Rec. p. 86.)

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Fourth. The County of Mercer subscribed to the capital stock of the Louisville Southern Railroad Company in pursuance of an Act of the General Assembly of the State of Kentucky, as follows:

CHAPTER 1159.

AN ACT TO AUTHORIZE THE COUNTY OF MERCER TO SUBSCRIBE AID TO THE LOUISVILLE SOUTHERN RAILROAD COMPANY.

Be it Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. That the county of Mercer may subscribe to the capital stock of the Louisville Southern Railroad Company as hereinafter provided, and may *pay therefor* in the *negotiable coupon bonds* of said county, payable not more than thirty years after date, and bearing interest at a rate not to exceed six per centum per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

SEC. 2. Whenever application shall be made to the judge of the county court of said county, by a petition of twenty-five resident tax-payers therein, requesting that the question of subscribing to the capital stock of the said railroad company, upon the terms and conditions set forth in said petition, be submitted to a vote of the legal voters of such county, it shall be the duty of the county judge to order an election to be held in such county on a day named therein to ascer-

tain the sense of the legal voters thereof upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than ten (10) days, and to be posted at the court-house door in such county, and at such other public places therein as he may by order direct; and, at such election, votes shall be received "For the Railroad Subscription," and "Against the Railroad Subscription." Officers of such election shall be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections.

SEC. 3. As soon as may be thereafter, the county judge of such county shall determine if a majority of the legal votes cast at such election were in favor of such subscription, and if they were, he shall thereupon enter an order subscribing in behalf of such county to the capital stock of the said railroad company in accordance with the terms of the proposition voted on, and he shall thereupon cause to be prepared and execute the negotiable bonds of such county as before mentioned, which shall be signed by him as county judge and attested by the county clerk, with his official seal affixed thereto, and the coupons shall be signed by said clerk.

SEC. 4. The said bonds shall not be binding or valid obligation until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they *shall be delivered* to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to

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receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds shall be deposited with a *trustee* or trust company, to be held in escrow, and *delivered* to the said railroad company *when* it shall become *entitled* to the same by the construction of its road through such county: *Provided, however*, That such trust company or trustee shall, before receiving such bonds, *give bond*, with good surety, approved by the county judge, for the *faithful performance of his or its duty* in the premises: *And provided further*, That no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg.

SEC. 5. An annual tax sufficient to pay the interest on such bonds, and the principal, when it shall become due, shall be levied and collected and paid out by the officers of such county, as provided in the case of other county taxes.

SEC. 6. This act shall take effect from and after its passage.

Approved May 15, 1886.

An election was duly held and pursuant to the authority given the County subscribed for $125,000 of the capital stock of the Railroad Company, and caused 125 bonds to be executed in the following form:

"UNITED STATES OF AMERICA.

"$1000. No. 105.

"LOUISVILLE SOUTHERN RAILROAD AID BONDS.

"*County of Mercer, State of Kentucky.*

"The County of Mercer, in the State of Kentucky, hereby acknowledges itself indebted and promises to pay to the Louisville Southern Railroad Company, or bearer, the sum of $1000 on or before the tenth day of January, A. D. 1917, at the Louisville Banking Company in the city of Louisville, Kentucky, with interest thereon at the rate of five per cent per annum, payable semi-annually at said bank on the tenth days of July and January after date respectively in each year, on presentation and surrender of the annexed coupons representing such interest. This bond is one of a series of one hundred and twenty-five bonds of even date herewith, all of the same denomination and tenor, and numbered consecutively from one to one hundred and twenty-five, the same *having been issued pursuant to the authority conferred upon the said county by an Act of the Legislature of Kentucky*, entitled 'An Act to authorize the county of Mercer to subscribe aid to the Louisville Southern Railroad Company," approved May 15th, 1886, and *pursuant to an order* entered by the county judge of said county in conformity with said Act subscribing in behalf of said county for the capital stock of the Louisville Southern Railroad Company in the sum of $125,000, which order was entered of record in said court on January 10th, A. D. 1887.

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"If the county of Mercer shall determine to pay any part of said series of bonds before the end of thirty years after their date, the county judge shall give at least three months' notice of such intention by a publication to be made in a newspaper published in each of the following places, viz., in Harrodsburg and Louisville, Kentucky, and New York City, stating the time when such bonds will be paid, and such call of said bonds shall be made consecutively, and not more than $25,000 of bonds shall be called in one year. Interest on the bonds so called shall cease at the end of three months from the publication of said call, provided the county shall have on deposit at the place of payment the amount of money necessary to pay the bonds named in said call.

"*In Witness Whereof*, The county of Mercer, by John W. Hughes, county judge thereof, has in the name and on behalf of said county subscribed and executed this bond, and the same has been attested by the county clerk of said county with his official seal affixed hereto, and the interest coupons attached thereto have been signed by the said clerk.

"Done on the tenth day of January, A. D. 1887.

"THE COUNTY OF MERCER, [SEAL]

"By JOHN W. HUGHES,

"Attest: "*County Judge.*

"BEN. C. ALLIN,

"*Clerk.*"

Fifth. These bonds were deposited (in accordance with the provisions of the fourth section of the Act) with a trustee who duly

gave bond in manner and form as required by the Act. (Rec. p. 24.)

The railroad was not completed from one line of the county through to another or opposite line, but was completed through the county about twenty miles to a point where a junction was made with the Cincinnati Southern R. R. Co., approaching within two miles of the opposite county line. (Rec. p. 29.)

Sixth. A question having arisen as to whether the road should be built from one county line to the opposite one, the railroad company prepared to extend its road to Danville in Boyle County, and acquired the right of way to the Boyle County line. The citizens of Mercer County were violently opposed to the road being extended to Danville, which was a rival town. The matter was publicly and generally discussed and a movement made to have the County Court instruct the trustee to deliver the bonds. (Rec. pp. 29-30.)

After full argument, the County Court, composed of the County Judge and the magistrates of the county, while disclaiming the right to

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order the trustee to deliver the bonds, by an unanimous vote entered an order expressing the opinion that the bonds should be delivered by the trustee and the construction of the railroad not forced to the Boyle County line and to Danville. This order was spread upon the county records. (Rec. pp. 30-31.)

Seventh. The trustee *decided* that all the conditions precedent had been performed by the railroad company, to wit: that the railroad had been so completed through the county that a train of cars had passed over the same within the time limited by the subscription contract. He delivered $105,000 of the bonds in the presence of the County Judge, who cut off and destroyed the past due coupons and received a certificate for $105,000 of the capital stock of the railroad company. (Rec. pp. 30, 31.)

Eighth. The county continually voted said stock, now holds the same, and has never tendered its return. The county regularly paid the coupons until the expiration of the time (allowed by the contract of subscription) within

which the road was to be completed through the county. (Rec. pp. 31, 32.)

Your petitioner bought the bonds and paid par and accrued interest therefor ($101,197.22) to a prior purchaser in the city of Philadelphia; and, as specially found by the lower court, is a *bona fide* purchaser without notice of any defect in or defense to the said bonds. (Rec. p. 35.)

Ninth. The Circuit Court of Appeals held the bonds to be void because the railroad was not completed from one county line entirely through to the opposite county line. (Rec. pp. 55, 56.)

It held that the county of Mercer was not estopped to contest the validity of the bonds even in the hands of a *bona fide* holder, *because*,

1. The trustee had no power to *decide* any thing as to the performance of the conditions precedent; but each purchaser of the bonds was bound to find out at his peril the physical fact whether the road had been completed through the county, and whether a train of cars had passed over the same *prior to a certain day*. (Rec. p. 63.)

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2. That even if the Act be construed as vesting the trustee with the power to decide as to the performance of the conditions precedent, the decision of the trustee in the present case is ineffectual because it is not recited in or *endorsed* on the bonds. (Rec. p. 60.)

Although the bonds recited that they had "been issued pursuant to the authority conferred upon the said county by an Act, etc.," and the county consented and urged that they be delivered with such a recital, the Circuit Court of Appeals held that the county was not thereby estopped to defend against even a *bona fide* holder; nor estopped by the payment of interest, nor by lying by till the time for completion had expired, nor by the holding and voting of the shares of stock received for the bonds. (Rec. pp. 67, 68.)

Your petitioner respectfully represents:

1. The decision of the Circuit Court of Appeals involves the validity of a very large class of securities which have been given currency in the markets of the world,

almost entirely by the decisions of this Court, and such securities, in this and other circuits, are profoundly and most injuriously affected by the decision complained of.

2. The amount involved in this controversy is large, viz., $100,000 of municipal bonds (with several years' accrued interest) purchased, at par, on the faith of the decisions of this Court, and will be a total loss under the decision of the Circuit Court of Appeals.

3. The decision is, in fundamental particulars, a distinct departure from a course of decision now firmly settled by this Court with reference to the construction of statutes authorizing the issue of "negotiable" municipal bonds.

4. It rests upon principles so clearly and so deeply in conflict with the decisions of this Court, that if permitted to become final and followed in other circuits, vast lines of securities now deemed perfectly safe must be declared void; confidence in municipal bonds as an investment will be destroyed, and great losses must be borne by persons who have

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invested on the faith of the decisions of this Court.

5. The statute authorizes the issue of "negotiable" bonds upon the performance of certain conditions precedent, which are matters not of record, but purely *in pais*.

That can not be a reasonable or just construction of such an Act, which holds that, in no way, and at no time, can the bonds so authorized ever in fact become negotiable; but that such bonds are, by the requirements of the Act itself, to be subject to contest until maturity, although purchased in good faith, in open market, for full value, after delivery made in good faith in the presence of the county officials, by the custodian designated by the Act to make delivery and required to give bond for the faithful performance of this very duty. Yet such is the effect of the opinion complained of.

WHEREFORE, your petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the

Sixth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case therein entitled County of Mercer, in the State of Kentucky, plaintiff in error, v. Provident Life and Trust Company of Philadelphia, defendant in error, No. 326, to the end that the said case may be reviewed and determined by this Court as provided by law, and that the judgment of the said Circuit Court of Appeals in the said case may be reversed by this Honorable Court.

And so your petitioner will ever pray.

SAMUEL DICKSON,

THOMAS W. BULLITT,

Counsel for the Provident Life and Trust Company of Philadelphia, Petitioner.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON, } ss.

Thomas W. Bullitt, being duly sworn, states that he is one of the counsel for the Provident Life and Trust Company of Philadelphia, the petitioner above named, that he has read the foregoing petition, and that the facts therein stated are true.

THOMAS W. BULLITT.

Subscribed and sworn to before me this 22d day of September, 1896.

WILLIAM MARSHALL BULLITT,

[SEAL] *Notary Public in and for the County of Jefferson, State of Kentucky.*

My commission expires February 4, 1900.

IN THE

SUPREME COURT of the UNITED STATES.

OCTOBER TERM, 1896.

EX PARTE—THE PROVIDENT LIFE AND TRUST COMPANY OF PHILADELPHIA, - - PETITIONER.

Brief in Support of the Application for a Writ of Certiorari.

This action involves the validity of $100,000 of negotiable bonds issued by the County of Mercer, State of Kentucky.

The application for *certiorari* is made with full recognition of the fact that the Circuit Courts of Appeals were established for the relief of the Supreme Court, and that to a large extent it is the policy of the law that they shall be treated as courts of last resort. But this court is given power to review their action, and it is believed that the case at bar is one which calls for the exercise of the discretion expressly conferred.

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Excepting real estate, it is probable that negotiable corporate bonds constitute the largest investments in this country. Of these, municipal bonds are the more important, as they are the favorite investment of those unskilled in business, who rely upon their public or governmental character as a voucher for their safety. To a vast extent they are held by non-residents of the States under whose authority they have been issued.

The validity of such bonds has been frequently tested in this court. The result is a long line of opinions wherein rules of clear and easy application have been laid down for the guidance of purchasers of municipal bonds. These decisions have been so lucid, so forcible, and so consistent that they might well be regarded as constituting a **rule of property** in respect to such bonds. They have given a credit to securities of this character which would never have resulted from the judgments of the State courts, and investors uniformly purchase on the faith of the decisions of this court.

A departure from or a disregard by the Cir-

cuit Courts of Appeals of the rules established by this court, followed by a refusal of this court, on any ground of general policy, to review their decisions, must give a great shock to this class of securities. The opinions of Circuit Judges may and doubtless will differ in the construction and application of the decisions of this court, and the validity of municipal and corporate bonds will at last come to depend upon the Circuit in which their validity may be tested. Perhaps a greater and more obvious danger is, that the decision complained of will be generally accepted in the other circuits, and that the law as declared by this court will be thus in effect completely altered by the Courts of Appeals.

We submit that the vast lines of securities which have been issued and purchased on the faith of the decisions of this court, should not now be left to the uncertainties involved in the conflicting opinions of any other court whatever. On the faith of those decisions the bonds involved in this controversy were purchased; it is believed that, tested by those decisions, they are valid securities.

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That the Circuit Court of Appeals, in declaring them void, has departed from and disregarded certain settled rules of statutory construction announced by this court, we now undertake to establish. If correct in this view, the case falls clearly within the reason announced by this court as a proper ground for issuing a *certiorari*, viz: "Where questions of gravity and importance are involved or in *the interest of uniformity of decision.*" *Lau. Ow. Bew.* v. *U. S.* 144 U. S. 47, 58; *American Const. Co.* v. *Jacksonville Ry. Co.*, 148 U. S. 372, 383.

The following we submit is a correct and full statement (in so far as applicable to this controversy) of the

RULES OF STATUTORY CONSTRUCTION SETTLED BY THE SUPREME COURT.

I.

All persons dealing with municipal bonds are charged with notice of the **Constitution** and **Statutes** of the State under the authority of which such bonds purport to be issued.

Knox v. *Aspinwall*, 21 How. 539, 544.
Lake County v. *Graham*, 130 U. S. 674, 680.
Barnett v. *Denison*, 145 U. S. 135, 139.

II.

In every case of statutory authority to issue *negotiable* municipal bonds, it will (in the absence of express words to the contrary) be **conclusively presumed** that the statute **intends to establish** and does establish some standard of evidence or some authority whereby a purchaser may **ascertain clearly and authoritatively, at the time of the purchase,** whether the conditions existed or have been performed which justify their lawful issue.

The absence of such a provision in a statute would nullify its declaration that the bonds are to be "negotiable."

Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 487, 488.

III.

If the authorizing statute shall (in lieu of the decision of some officer or tribunal) designate some fixed **standard of evidence** on the subject, such as a **public record** or the

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like, then purchasers of bonds are bound to resort for information to such **standard of evidence** and can not plead as against the municipality, either representations by its officers or a decision by any alleged tribunal.

Sutliff v. *Lake County Com'rs*, 147 U. S. 230, 235.
Dixon Co. v. *Field*, 111 U. S. 83, 93.
Lake County v. *Graham*, 130 U. S. 674, 683, 684.
Buchanan v. *Litchfield*, 102 U. S. 278, 289-292.

IV.

But if some other standard of authority be not designated by the Act, then the **person or persons** whose duty it may be to execute and deliver or ultimately to **deliver** the bonds will be **conclusively presumed** to be the tribunal designated by law to "ascertain and determine" whether the conditions have been performed which justify the issuance of the bonds as negotiable securities.

Oregon v. *Jennings*, 119 U. S. 74, 92.
Coloma v. *Eaves*, 92 U. S. 484, 487-489.
Lewis v. *Commissioners*, 105 U. S. 739, 749.
Knox v. *Aspinwall*, 21 How. 539, 544.
Bissell v. *Jeffersonville*, 24 How. 287, 298, 299.
Andes v. *Ely*, 158 U. S. 312, 324.

V.

On behalf of *bona fide* purchasers for value a **decision** by such statutory tribunal that all conditions precedent have been performed is **conclusive** and estops the obligor from disputing the fact.

See authorities cited under No. IV *supra*. See especially

Coloma v. *Eaves*, 92 U. S. 484, 491.
Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.

VI.

A recital by the statutory tribunal in the bonds, that they are issued **pursuant** to the authorizing statute, is sufficient evidence to a *bona fide* purchaser that such decision has been made and concludes the municipality.

Andes v. *Ely*, 158 U. S. 312, 324.
Knox v. *Aspinwall*, 21 How. 539, 545.
Oregon v. *Jennings*, 119 U. S. 74, 93.
Insurance Co. v. *Bruce*, 105 U. S. 328, 332.
Livingston County v. *Portsmouth Bank*, 128 U. S. 102, 127.
Pana v. *Bowler*, 107 U. S. 529, 539, 540.
See also cases cited under Nos. IV and V *supra*.

The estoppel, however, is created by and de-

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pends upon the **decision** and not upon the **recital**; the recital being only **evidence** of the decision.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Knox v. *Aspinwall*, 21 How. 539, 545.
Bissell v. *Jeffersonville*, 24 How. 287, 299.
Coloma v. *Eaves*, 92 U. S. 484, 490, 491.
Kenicott v. *Supervisors*, 16 Wall. 452, 464.

VII.

If a municipal corporation is authorized to issue **negotiable** bonds, **provided** that certain conditions precedent have been complied with, and if it shall cause to be recited in such bonds or shall otherwise represent that such conditions have been performed, the municipality is afterwards estopped to dispute the fact.

[*See authorities cited under Nos. IV and V supra.*]

On the faith of these rules petitioner made its purchase, and by them it is now proposed to test

THE DECISION OF THE CIRCUIT COURT OF APPEALS.

The opinion declares:

1. That the language of the authorizing statute *does not vest in the trustee* (named

therein) the *power or duty to decide* whether or not the conditions precedent have been performed upon which depend his duty to deliver the bonds, as *negotiable* securities, to the railroad company. (Rec. pp. 63, 54.)

2. That if such power may be inferred from the general language of the act, yet the accompanying direction that the trustee is to hold the bonds "*in escrow*" shows that the vesting of such power was not within the legislative intent. (Rec. p. 65.)

3. That if such power or duty was vested in the trustee, yet his decision is *ineffectual* because it is *not recited in* or endorsed upon the bonds themselves. (Rec. p. 60.)

4. That the admitted consent and co-operation of the County in the delivery of the bonds, its acceptance and use of the stocks which was the consideration for the bonds, the payment of interest, and the deliberate lying by until the time for completing the road had expired, do not estop the

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County from now declaring that the conditions precedent to a rightful delivery of the bonds were not performed. (Rec. pp. 67, 68.)

The correctness of these positions will be considered in their order. We maintain:

FIRST POINT.

The trustee was invested by the Act with the power and duty to decide whether the conditions precedent to a rightful delivery of the bonds had been performed, and his decision is conclusive.

Waiving for the present the alleged limiting effect of the word "escrow" we direct attention to the positive language of the statute.

Its first and fourth sections are alone material to this discussion.

The *first section* provides that the county may subscribe stock and "*pay* therefor in *negotiable* bonds."

The *fourth section* provides that the bonds shall be deposited with a trustee "to be held in escrow, and *delivered* to the said Railroad Company *when* it shall become entitled to the same by the construction of its road through such County, etc." It likewise requires that the trustee shall give bond for the "faithful performance of his duty."

This language, if not controlled by the words "in escrow," fulfills every requirement of the

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rule which conclusively presumes that the trustee was vested with power to decide whether the conditions had been performed, upon which would depend his duty to deliver the bonds.

The bonds are to be *negotiable;* the Act provides no other standard of evidence; designates no tribunal, other than the trustee himself, to ascertain and decide whether the conditions have been performed. The question as to the performance of "conditions precedent" depends upon matters *in pais**; the lawful delivery of the bonds must be preceded by an ascertainment and decision that the conditions have been performed; the trustee can not be quiescent or decline to act; his duty to decide and to act is enforced by a bond for its faithful discharge; he has no colleague or adviser, and the decision must be made by him and by him alone.

That decision when made must, in favor of *bona fide* purchasers, be conclusive, for in no other way can the fundamental purpose to make the bonds negotiable be accomplished.

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*See Appendix, page 69.

In rejecting this conclusion the Circuit Court of Appeals rests its opinion upon three grounds, to wit:

a. "If he (the trustee), is empowered to make any determination whatever, the power is only inferentially granted" (Rec. p. 63); but this inference can not be indulged because:

b. The Act makes no provision "requiring an indorsement of such decision on the bonds or the making of some other permanent record that so grave a determination had been made" (Rec. p. 63); and because:

c. The trustee was not the "agent" of the county; consequently it was not "intended that he should conclude the county through any agency for or in relation to it." (Rec. p. 64.)

We submit that at every step the opinion is in conflict with the decisions of this Court.

In respect to an "inferential" grant of power, it need only be observed that in the long line of decisions from *Knox* v. *Aspinwall* to *Andes* v. *Ely*, in no instance (except *Chaffee* v. *Potter*, 142 U. S., 355, 362, and *Lewis* v. *Commissioners*,

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105 U. S. 739, 742), was the official, whose decision was accepted as conclusive, charged in express words with the duty or power of making such decision. That power was invariably "inferred" from the fact that the designated official was charged with the duty of delivering negotiable bonds upon the performance of certain conditions precedent, and that no other provision was made for determining whether and when they had been performed.

The point was expressly raised and decided in *Knox* v. *Aspinwall*, 21 How. 539, 544; *Bissell* v. *Jeffersonville*, 24 How. 287, 298, 299, and *Oregon* v. *Jennings*, 119 U. S. 74, 92.

In *Coloma* v. *Eaves*, 92 U. S. 484, 489, the Court, quoting and approving *Commissioners* v. *Nichols*, 14 Ohio St. 260, say:

> "A statute, in providing that county bonds should not be delivered by the commissioners until a sufficient sum had been provided by stock subscriptions to complete a certain railroad, and imposing upon them the duty of *delivering* the bonds when such provision had been made, without indicating any person or tribunal to *determine* that fact, *necessarily delegates that power* to the commissioners; and if delivered improvidently the bonds will not be invalidated."

In the case at bar the statute imposed upon the trustee the duty of delivering the bonds *when* the conditions precedent were performed without indicating any person to determine that fact; it follows that the statute "necessarily delegates" the power to decide to the trustee.

In the same case, at page 488, it is said,

> "At some time or other it is to be ascertained whether the directions of the act have been followed. The *duty of ascertaining* was plainly intended to be *vested somewhere*, and *once for all;* and the *only persons* spoken of, who have any duties to perform respecting the election and action consequent upon it, are the town clerk and the supervisor. . . . *It is a fair presumption*, therefore, that the Legislature *intended* that those officers, or one of them at least, should *determine* whether the requirements of the act . . . had been met."

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, Mr. Justice BREWER said:

> "It is urged . . . that the statute does not *in terms* give them authority to determine whether the preliminary conditions have been complied with.
>
> While it is true that the act does not in terms say that these commissioners are to decide that all

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preliminary conditions have been complied with, yet *such express direction and authority is seldom found in acts providing for the issuing of bonds.* IT IS ENOUGH THAT FULL CONTROL IN THE MATTER IS GIVEN TO THE OFFICERS NAMED."

The second objection, that the Act makes no provision that the trustee's decision should be "endorsed" upon the bonds, or otherwise made a matter of record, is equally untenable.

This is a most startling innovation upon the law governing these securities, and of itself justifies this application for a *certiorari.*

So far as we can recall, in only two of the cases (*Lewis* v. *Commissioners*, 105 U. S. 739, 742, and *Chaffee* v. *Potter*, 142 U. S. 355, 364,) decided by this Court was there a requirement in the enabling Act, that the decision touching conditions precedent should in any way be made a part of the bond, or a matter of record. The "recital" of such decision in the bonds has uniformly been a purely voluntary act not required or suggested by the statute.

The third suggestion in the opinion, that because the trustee was not an "agent" of the

county his powers are to be considered less ample than would be similar powers vested in a county officer, is founded in a total misconception of the decisions of this Court.

A review of these will demonstrate that the conclusive force given to decisions by county officials, respecting conditions precedent, is in no sense whatever based upon their relation of agency for the municipality, but rests exclusively upon the fact that the Legislature has created a "tribunal," and vested in it the authority to "decide" a given question.

The power of the tribunal and the force of its decision are alike *derived from the Act*, and not from the consent or direction of the municipality.

In *Bissell* v. *Jeffersonville*, 24 How. 287, 299, the court refers to the "jurisdiction of the subject-matter" as vested by the Act in the Common Council; and in *Coloma* v. *Eaves*, 92 U. S. 484, 489, the town clerk is referred to as the "arbiter."

In none of the cases has the conclusiveness of the decision and recital been based upon any supposed *agency* of the person authorized

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to decide; it has always been because of a power delegated or vested by the Act itself.

Marcy v. *Oswego*, 92 U. S. 637, 639.
Chaffee v. *Potter*, 142 U. S. 355, 364.
Northern Bank v. *Porter Township*, 110 U. S. 608, 617.

See quotation from *Coloma* v. *Eaves*, p. 31, *supra*.

But the following cases seem to settle the question beyond controversy:

In *Bernards Township* v. *Morrison*, 133 U. S. 523, 527, 528, the persons charged with executing and delivering the bonds *were not county officials* at all. They were special "commissioners" appointed by the Circuit Court of the county—exactly as the trustee herein was appointed by the County Court. The point now made was specially urged in that case. It was held: that the power to decide being "inferentially" granted *by the statute*, the county was estopped and that no question of agency was involved.

In *Andes* v. *Ely*, 158 U. S. 312, 324, the persons authorized to issue bonds and "*inferentially*" presumed to have authority to decide

conclusively as to conditions precedent *were not county officials at all.* They were "special commissioners" appointed under authority of the enabling act.

In this respect those cases are exactly analogous to the case at bar.

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SECOND POINT.

The words "in escrow," as used in the Act, do not so limit or control the accompanying language as to show that the legislature designed to withhold from the trustee the power and duty to decide conclusively as to the performance of the conditions precedent to a rightful delivery of the bonds deposited with him.

The Circuit Court of Appeals concedes that the term "in escrow" is one strictly applicable to deeds only, and is not technically applicable to negotiable instruments.*

But the court declares that the direction to hold "in escrow" "implies that the term was used just as it would be if the subject-matter of the deposit was a deed." (Rec. p. 65.)

The court ignores, as entitled to no weight whatever, the facts that the County Court of

* It is Text-book law that where a deposit is made "in escrow" of negotiable paper, the defense of an improper delivery or failure of the contingency, though good against the payee, will not avail against a *bona fide* holder for value. (6 Am. and Eng. Enc. of Law, pp. 867–869, citing *Vallett* v. *Parker*, 6 Wend. 615, *Fearing* v. *Clark*, 16 Gray, 174; *Clarke* v. *Johnson*, 54 Ill. 296.)

It is apparent, therefore, that there is nothing in the mistaken and colloquial use of the phrase "in escrow" to detract from the peculiar position of authority and responsibility conferred upon the trustee—itself a term involving the reposing of confidence.

Mercer County, its sole fiscal agent, and the County Judge consented and urged that the conditions had been performed and that the trustee should deliver the bonds; and that the construction of the road was stopped short of the county line solely by reason of the urgent desire of the County itself. The Court insists that these words "in escrow" peremptorily forbid a consideration of any question save one: Was the condition of the escrow literally performed?

To this view we now direct attention.

Manifestly, as conceded by the Court, we are not bound to construe the word "escrow" according to its strict technical definition at common law. Having been taken by the Legislature out of its legitimate sphere, evidently in a colloquial sense, we must look to the context to ascertain the sense in which it was used; but the context embraces the whole Act and its general purpose. The Act must be read and the term "in escrow" must be read so as if possible to make all parts of the Act consistent.

Giving to the word "escrow" the effect at-

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tributed to it by His Honor, Judge Barr, in the Circuit Court, all parts of the Act are consistent. As construed by the Court of Appeals, **two** of its most important provisions are **nullified.**

I. In the first place, the Act declares as its fundamental purpose that the County is to "pay for" the stock subscribed in "*negotiable*" bonds.

To constitute negotiable bonds there must be a fixed or ascertainable time, before maturity, when they shall so become negotiable. There must likewise be some standard of evidence or some authority to determine the question, so that a proposing purchaser may definitely and authoritatively ascertain whether at that time they have become negotiable. If such provision be not made, or if a contrary provision be made, then the bonds are not negotiable, and the declaration in the authorizing Act that they are negotiable is nugatory and misleading.

The Act under consideration not only declares that the bonds issued under it are to

be negotiable bonds, but manifestly intends them to become so *when used* to "pay for" the subscribed stock. It likewise provides, in a form which, time and again, has been approved as sufficient by this Court, for a definite and authoritative decision of the question whether the conditions precedent to their lawful delivery, as negotiable instruments, have been performed.

But if by reason of the words "in escrow," the trustee is deprived of the power to decide as to the performance of conditions precedent, and if the defense of non-performance remains always open, then clearly the bonds are not, and under the Act *can not, in any way or at any time, become negotiable.*

That single phrase nullifies absolutely and completely the fundamental purpose of the Act to make the bonds negotiable.

II. But the construction placed on the words "in escrow" nullifies another equally important provision of the Act, viz:

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That the trustee "shall, before receiving such bonds, *give bond* with good surety, approved by the County Judge, for the faithful *performance of his duty* in the premises."

The opinion of Judge Barr treats the fourth section of the Act as harmonious throughout, and gives full effect to this important provision. Under the opinion of the Court of Appeals that provision is useless and without meaning.

Let us consider just what this "bond" provides for.

To **hold** the bonds **until** and to **deliver** them **when** the road was completed was the sole duty of the trustee; the bond was for the "faithful performance" of that duty. In its performance and therefore in the bond, the county and the railroad company had an equal interest.

That the County had an important interest to be protected is emphasized by the fact that the trustee is to be named by and his bond is to be approved by the County Judge.

What then was the true nature of the

County's interest? Against what unfaithfulness was it to be protected? If the Act be construed according to its plain natural import and in accordance with the decisions of this Court, its meaning is clear and simple. The trustee was vested with the power to decide whether and when the conditions precedent to the rightful delivery of the bonds were performed, and thereby to put them forth as *negotiable* instruments. In that fact is found a full and sufficient reason for requiring of him a bond for the protection both of the County and of the Railroad Company.

But, under the opinion of the Court of Appeals, the trustee's bond was as to the County a useless and senseless formality. *There is no conceivable state of circumstances under which the County could ever recover one dollar for a breach of the trustee's bond* —unless perhaps for court costs in some litigation. But to hold that the bond refers merely to costs rather than to the substantial duty imposed on the trustee, is simply to disregard the plain import of language.

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A delivery of the bonds *before* completion of the railroad, whether made negligently, by collusion or with a view to embezzlement, would inflict no injury upon the County; because (according to the Circuit Court of Appeals) the bonds being in escrow are void in the hands of even *bona fide* holders. If lost, converted, or embezzled *after* completion of the road the Railroad Company might have a cause of action on the trustee's bond, but *the County would not.* In case of such default the Railroad company could resort for compensation to the trustee alone.

The Circuit Court of Appeals does not point out wherein the County can possibly have an interest in the trustee's bond except in the matter of costs. It, however, concludes a brief reference to it in these words:

> "It was eminently reasonable that the custodian of such securities, negotiable in form, should give security to protect both parties against negligence, conversion, embezzlement or any willful refusal to faithfully perform the trust."

Precisely what effect "the negotiable form" of the bonds was supposed to have, in view

of the opinion that the Act *does not* confer negotiability, we are unable to perceive.

Having shown that the bond affords no protection to the County in the matter of "negligence, conversion, or embezzlement," we proceed to show that, on the basis of the Court's opinion, neither the Railroad Company nor the County could have resort to the bond for any other "willful refusal to perform the trust." Outside of "negligence, conversion or embezzlement," occurring *after* completion of the road, *there could be* no willful refusal to perform the trust. If the trustee had no power to decide as to conditions performed there was no duty upon him to decide; if there was no duty to decide there was no duty to make delivery, for delivery could not rightfully be made until that question was decided. To any demand for action by the trustee he could rightfully respond that having no power to decide he was under no obligation to inquire whether the conditions precedent to a rightful delivery had been performed.

Such is the inevitable result from the opinion of the Circuit Court of Appeals. We submit that it nullifies two of the most important provisions of the Act under consideration.

THIRD POINT.

The decision of the trustee, that the conditions precedent had been performed, is not rendered ineffectual because not recited in or endorsed upon the bonds.

We will hereafter insist that, in effect, the decision of the trustee is "recited" in the bonds in controversy; but, for the purpose of testing the accuracy of the opinion under discussion, we shall for the present concede that there is no such recital.

That there may be no misconception as to the exact position of the Circuit Court of Appeals, we quote from the opinion (Rec. p. 60):

> "Where railroad construction bonds have been issued in violation of the law under which authority was granted, THE MUNICIPALITY HAS NEVER BEEN HELD ESTOPPED to defend upon that ground, UNLESS REPRESENTATIONS APPEARED ON THE BONDS THEMSELVES importing full compliance with the conditions imposed by the enabling Act. The estoppel has been a CONSEQUENCE OF RECITALS or indorsements, etc."

In the case of the *Louisville Trust Company* v. *Louisville, New Albany & Chicago Railway*

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Co., very recently decided, the Circuit Court of Appeals refers to its opinion in this cause, and to that alone as authority, and says (TAFT, C. J.):

> "It now appears to be settled that in such cases the City or County can not be estopped to show irregularities in the issuance of the bonds UNLESS THERE ARE EXPRESS RECITALS of full compliance with statutory requirements, signed by an officer who has the implied or express authority by virtue of the statute to pass upon the question of compliance and to speak for the public or *quasi* corporation issuing the same. *County of Mercer* v. *Provident Life & Trust Co.*, 43 U. S. App. 21, 37."

That opinion goes one step further than the opinion in this cause, to wit: In declaring that even an *indorsement of the trustee's decision* would be ineffectual, and that it must appear by way of "express recital" in the bonds themselves.

The importance of this declaration by the Circuit Court of Appeals can not be overestimated. Vast lines of securities regarded today as safe are liable to be avoided by it.

We submit that the opinion is not supported

by any decision of the Supreme Court, and is in conflict with the reasoning and grounds upon which its various decisions rest.

The question, in express terms, has perhaps not been passed on by this Court; but its determination is necessarily involved in numerous decisions made by it.

In all but a few cases before this Court, the bonds in fact recited full compliance with the law. In every such case, where the persons issuing the bonds were authorized to decide as to conditions precedent, the recital was held to be equivalent to a decision and *therefore* conclusive. Where such authority did not exist the recital was held to be valueless. In the few cases of bonds without recitals it has appeared *either* that no decision had been made, *or* that the decision relied on was made by one without authority to decide. Here, for the first time, we encounter the case of one having (or assumed to have) authority to decide, and having actually decided that all conditions precedent were performed, and yet his decision is not recited in or indorsed upon the bonds. But the question is necessarily involved in

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repeated decisions of this Court, and in effect has been definitely settled by it.

A review of the decisions of the Supreme Court will show that the recital, of the performance of conditions precedent, depends for its value exclusively upon the fact that it is the *evidence of* and is *equivalent to* a decision by the proper official; and that such *decision*, if in fact made, is equally conclusive although not incorporated in the bonds.

1. In only one case, so far as we can recall (*Lewis* v. *Commissioners*, 105 U. S. 239), did the enabling Act require or contemplate that the bonds should contain either a recital or an indorsement as to the performance of conditions precedent; in every case the recitals have been purely voluntary.

It can not therefore be said that the Supreme Court has given effect to such recitals because of any supposed statutory force. Recitals have been held conclusive simply because they are the *evidence of a decision*, which decision is required by the statute and is given conclusive force in order to confer upon bonds a *negotiable* character.

2. That it is the *decision* by the proper official and not its *recital* which confers a negotiable character on bonds, issued in fact before the performance of the conditions precedent, may be established by reference to the reasoning of this Court in many cases.

In the leading case of *Knox* v. *Aspinwall*, 21 How. 539, 544, the Court after declaring that the conditions precedent had not been performed, said:

> "This would seem to be decisive against the authority on the part of the Board to issue the bonds, were it not for a question that underlies it; and that is, who is to *determine* whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? Is it to be determined by the court, in this collateral way, in every suit upon the bond or coupon attached, or by the board of commissioners, as a duty imposed upon it before making the subscription? The court is of opinion that the question belonged to this Board."

Referring to the fact that "the bonds on their face import compliance with the law," the Court said:

> "The purchaser was not bound to look further for *evidence* of a compliance with the conditions to the grant of the power."

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Manifestly in this great case the *decision* of the county officials is that which was held to give negotiability to the bonds; the recital was merely *evidence* of that decision.

In *Bissell* v. *Jeffersonville*, 24 How. 287, although the bonds contained the usual recital, the Supreme Court in its opinion does not in the slightest degree rely upon that fact. The opinion rests exclusively on the fact that the enabling Act committed to the Common Council of Jeffersonville jurisdiction to decide the question as to the performance of conditions precedent, and that in behalf of innocent holders of bonds its decision was conclusive. Dealing with the defense that the decision of the Council was in fact false, the Court said:

> "It only remains to consider the *effect of that determination*. . . . It must have been understood by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means of borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the Act, it contemplated that the bonds should be issued before it was *conclusively determined* that the requisite number of legal voters of the city had

> petitioned the Common Council. . . . Duly certified copies of the record of the proceedings (of the Council) were *exhibited to the plaintiffs at the time they received the bonds*, showing to a demonstration that a further examination of the subject would have been useless."

The judgment of the lower court was reversed, because it had admitted evidence tending to show that the decision of the Council was untrue in fact.

Manifestly the negotiability of the bonds was made to rest not upon the recital in the bonds but on the fact of the decision.

In *Marcy* v. *Oswego*, 92 U. S. 637, 639, Mr. Justice STRONG said:

> "Where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their *decision* is final in a suit by the *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative act have been complied with is conclusive."

In *Coloma* v. *Eaves*, 92 U. S. 484, 490, the Court said:

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> "The persons appointed to decide whether the necessary prerequisites to their issue had been completed have decided, and certified their decision. . . . Their recitals are such a decision; and beyond those a *bona fide* purchaser is not bound to look for *evidence* of the existence of things *in pais*."

In the same opinion the Court has drawn the very distinction for which we contend. Quoting from Dillon on Municipal Corporations, to the effect that the "determination of a matter *in pais*" by the tribunal "invested with power to decide whether the condition precedent has been complied with" is conclusive, the Court say, that "this is a very cautious statement of the doctrine. It may be restated in a slightly different form," and continue (p. 491):

> "Where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been, made in the bonds issued by them and held by a *bona fide* purchaser, is conclusive of the fact, and binding upon the municipality, *for the recital is itself a decision* of the fact by the appointed tribunal."

The necessary inference from this language is, that the Court approves the "cautious state-

ment" of Judge Dillon that the *decision* is conclusive, and then goes a step further and holds, to wit, that even though there has been no express determination, yet a recital estops the county because, in favor of a *bona fide* holder, *it is a decision.*

In *Kenicott* v. *Supervisors*, 16 Wall. 452, 464, the Court said it was settled that,

> "A recital that the election has been held, or that the fact exists, or has taken place, will be sufficient *evidence* of the fact to all *bona fide* holders of the bonds."

In each of these cases *the fact of the decision* is declared to be the controlling fact; the recital is merely referred to as the *evidence* or certificate of the decision; in neither of them is there a suggestion that the decision depends for its conclusive force upon its recital in the bonds. The entire ignoring of the fact of recital in *Bissell* v. *Jeffersonville*, coupled with the declaration that proceedings of the Council "were exhibited to the plaintiffs at the time they received the bonds," conclusively establish that the mere recital was deemed unimportant.

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The authorities referred to by the Circuit Court of Appeals in support of its proposition are,

Coloma v. *Eaves*, 92 U. S. 484.
Dixon v. *Field*, 111 U. S. 82, 93.
German Bank v. *Franklin County*, 128 U. S. 526.
Citizen's Association v. *Perry*, 156 U. S. 692, 701.

Neither of the cases sustains the opinion of the Court.

Coloma v. *Eaves*, as reviewed above, contradicts rather than supports its opinion.

In *Dixon* v. *Field* the bonds were held void, although there was a *full recital*, because the statute fixed an "express and definite record of a public character," and therefore the County officials had no power to make any decisions respecting the performance of the conditions precedent. (See No. III, p. 22, *supra.*)

In *German Bank* v. *Franklin County*, *the bonds contained no recitals*, and the certificate of the auditor attached to the bonds, as stated by this court, neither "covers or certifies any fact as to compliance with the conditions prescribed;" and furthermore, the audi-

tor had no power to decide any thing relative to the bonds.

In *Citizens' Association* v. *Perry*, there was neither a recital in the bonds of compliance with the Constitution of 1870, nor was there any decision by an authorized officer that the conditions precedent had been performed.

The cases are inapplicable to support the opinion of the Circuit Court of Appeals. In no case has it been held or intimated that a recital on the face of bonds is essential to give validity to the decision of an authorized officer in respect to the performance of conditions precedent.

If the petitioner on purchasing the $100,000 of bonds inquired and found that the trustee had decided that the conditions precedent had been performed, that the County Court expressly concurred in that decision as correct in fact, and that under such circumstances the bonds were then issued with a recital of compliance, was it not entitled to to rely upon such information quite as securely as upon an indorsement on the bonds? The indorsement is only evidence of the decision;

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and evidence of the decision would seem to be sufficient whether by way of indorsement or otherwise.

In conclusion of this point, we insist that the recital, on the face of the bonds in controversy, that they are issued "pursuant" to the enabling statute is equivalent to *a representation both by the county and the trustee* that all conditions precedent had been performed.

We concede that the purchaser of these bonds is charged with notice of the enabling statute and that it requires the bonds to be placed in the hands of a trustee before performance of the conditions precedent. But the statute does not provide nor contemplate that they shall contain a recital of conditions performed. The insertion of this recital was purely voluntary. The delivery of the bonds by the trustee, with that recital, *was an adoption of it by him*, and is the full equivalent of a recital by the trustee on the face of the bonds, or of a separate indorsement by him on the bonds. It is exactly as if, after the conditions were fully performed, the county had caused the bonds to be re-engraved,

embodying this recital for the purpose of declaring that the conditions were performed and the trustees had put them forth in that form and for that purpose. The recital being purely voluntary it could have no other purpose than to declare to purchasers that, as decided by the trustee, the conditions precedent had been in fact fully performed.

If this be not so, and if it be true that a "recital" is essential to give validity to the trustee's decision, it follows that, as the Act makes no provision for a signing of the bonds by the trustee, it was impossible that, in any way, the bonds could ever be made "negotiable" and the expressed purpose of the Act, that they should be negotiable, is absolutely nugatory and misleading. Such a view is in conflict with the settled rulings of this court.

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FOURTH POINT.

The co-operation of the County in the delivery of the bonds, its acceptance and use of the certificates of stock which were the considera- for the bonds, the payment of interest and the deliberate lying by until the time had expired for completing the two unfinished miles of road, estopped the County from setting up the defense that the conditions precedent had not been performed.

Preliminary to a discussion of the opinion of the Circuit Court of Appeals on this point it seems proper to bring briefly into view the facts on which our contention depends. When the railroad was completed through Harrodsburg to Burgin, approaching within two miles of the southern line of Mercer County, the Railroad Company conceived itself to be entitled to the bonds. The trustee was in doubt whether the conditions precedent were fully performed. The Railroad Company at once prepared to extend the road across the County line to Danville. Thereupon, in order to prevent its extension, the County Court, composed of the Magistrates and County Judge, was convened

to consider the question. By a resolution entered of record, the members of the court, while disclaiming the right to instruct the trustee, expressed the opinion that the conditions had been performed, and advised that delivery should be made and the construction of the railroad not forced to the Boyle County line. This fact and the fact that the trustee had decided that the conditions had been complied with was made known throughout the County generally. The trustee waited nearly one month before making a delivery. No steps were taken towards injunction nor any objection made to the trustee's action. Finally in the presence of the County Judge and with his consent the bonds were delivered. The stock subscribed for was delivered to and received by the County Judge, and the county holds it to this day, having voted it upon many important occasions. For two years and a half the county paid the interest regularly, and only after the lapse of five years from the date of subscription, when, under the contract, the railroad could no longer perform, the county repudiated the obligation of the bonds.

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Estoppel arises not alone because of a power in county officials to *decide* as to the performance of conditions precedent; but because of representations or other conduct by the county officials to mislead *bona fide* purchasers of its bonds.

If it be within the power of the County to create an estoppel it has certainly done so. We submit that it is estopped by its own conduct.

The Circuit Court of Appeals rejected this contention upon the authority of cases which very properly hold that where a municipality had originally no power to contract there could be no estoppel by ratification or otherwise. But here the County was authorized to execute the bonds. A clear power to contract was conferred, and though the right to exercise it depended upon the happening of a certain fact, yet it was actually exercised under circumstances which justified the purchaser of the bonds in believing that the fact had happened. The County should therefore be estopped from denying that it had acted unlawfully. *With full knowledge of the facts the County deliberately consented to the delivery by the trustee of its*

bonds bearing on their face a recital that all the conditions precedent had been performed.

The fact that the conclusive decision of that question was vested in the trustee, did not relieve the County from its duty to forbid and prevent delivery of the bonds before performance of the conditions. The putting forth of the bonds under the circumstances was a distinct *representation by the County as well as the trustee* that the conditions had been fully performed.

Would not a purchaser having knowledge of these facts be entitled to rely upon the action of the County in connection with the recital in the bonds as a representation of the performance of all conditions precedent? The action of the County, consenting that the bonds should go forth with such a recital upon their face and the acceptance by it of the subscribed stock amounted to a deliberate fraud perpetrated upon the petitioner, if indeed the County is now permitted to defend upon grounds which are contrary to its representation.

The following quotations from the opinions

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of this court are, we submit, conclusive of the question.

It is impossibe to find language more explicit and emphatic than in the opinion of this Court in *Pendleton County* v. *Amy*, 13 Wall. 297–304, where it is said:

> "Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers or the people of the county, the bonds can always be avoided in the hands of an innocent purchaser by proof that the county officers or the people have not done or have insufficiently done the things which the legislature required to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds

in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfillment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled. The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest and the bonds."

The language of the opinion in *County of Ray* v. *Vansycle*, 96 U. S. 675, 687–8, is equally pertinent:

"There is nothing in the record upon which to base any imputation of collusion or bad faith. The action was taken under such circumstances of publicity as to notify the taxpayers generally of all that was doing; and we are not prepared to say that the court had not the power to transfer the subscription from the North Missouri Railroad Company to the St. Louis and St. Joseph Railroad Company, and deliver the county bonds to the latter upon its agreement to build substantially the same road for the construction of which the original subscription had been made.

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"But whatever doubt exists upon this point should be resolved in favor of the *bona fide* holders of the bonds. The taxpayers of the county should not, under the peculiar circumstances of this case, be now heard to allege that their agents, invested by statute with the authority and charged with the duty of protecting their interests, had exceeded their powers. . . .

"Upon the clearest principles of justice the taxpayers of Ray County are concluded by the acts of their official agents, and by their own failure, either intentionally or from neglect, to assert by appropriate proceedings, their legal right (if any they ever had) to prevent the transfer of their original subscription to the company, which, by the construction of its road, gave them greater railroad facilities, and at no greater cost, than they could have obtained under the contract with the North Missouri Railroad Company."

So in *County of Clay*, v. *Society for Savings*, 104 U. S. 579, 590, the payment of interest for nine years and eleven years was held sufficient to cure irregularities in issuing the bonds.

In *Anderson County* v. *Beal*, 113 U. S. 227–240, the want of proper notice of an election was held only an irregularity, and the failure of the municipality or the taxpayers to enjoin the issue or use of the bonds was regarded as sufficient ground for holding the municipality estopped.

In *Mercer County* v. *Hacket*, 1 Wall. 83, and *Ward* v. *Lawrence County*, 1 Black, 386, both approved in *Grand Chute* v. *Winegar*, 15 Wall. 355, the bonds were sold at less than par, in violation of the Act, which prohibited such sale. The same ruling was made in *Bissell* v. *Jeffersonville*, 24 How. 287; *Meyer* v. *Muscatine*, 1 Wall. 384; *Rogers* v. *Burlington*, 3 Wall. 654; *County of Chambers* v. *Clews*, 11 Wall 317, 321.

A very recent statement of the position of this court is to be found in the opinion of Mr. Justice Brewer, in *Andes* v. *Ely*, 158 U. S. 312, 321, in which he says:

> "While courts may properly see to it that proceedings for casting burdens upon a community comply with all the substantial requisitions of a statute in order that no such burden may be recklessly or fraudulently imposed, yet such statutes are not of a criminal character, and proceedings are not to be so technically construed and limited as to make them a mere snare to those who are encouraged to invest in the securities of the municipality. These considerations are appropriate to the case. The proceedings on the part of the town and the railroad company were carried on in evident good faith. No one questioned their validity, no effort was made to review the action of the

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county judge, the bonds were issued, more than $100,000 was spent within the limits of the town in the construction of the road, and years went by during which the town paid the interest and part of the principal before any question was made as to their validity. We think there is eminent wisdom and justice in the observations of the Court of Appeals in the case of *Calhoun v. Millard, supra* (121 N. Y. 69):

"'The town and the taxpayers permitted the bonds to be dealt with and taken by savings banks and others for nearly ten years, not only without, so far as appears, a word of warning or protest, but by affirmative acts of recognition encouraged investments therein as safe and valid securities. The bonds, resting on the adjudication of the county judge, were apparently valid. The legislature has still the power to ratify them and make them valid obligations of the town. *Williams v. Town of Duanesburgh*, 66 N. Y. 129; *Horton v. Town of Thompson*, 71 N. Y., 513; *Rogers v. Stephens*, 86 N. Y. 623. They are now in the hands of *bona fide* holders, that is, of persons who have paid value for them without notice. . . . The denial of relief in this case may result practically in enforcements of the bonds in question, and also of other town bonds issued and held under similar circumstances. But in contrasting the relative conduct and situation of the town and taxpayers on the one side, and the purchasers of bonds on the other, we can not say that such a result will be repugnant to any principle of justice or equity.'"

Conclusion.

The petitioner therefore submits that the writ of *certiorari* should be granted, because the opinion of the Circuit Court of Appeals is clearly opposed to and disregards the settled doctrine of this Court with regard to the issuance of negotiable bonds.

SAMUEL DICKSON,
THOMAS W. BULLITT,

Counsel for the Provident Life & Trust Co. of Philadelphia, Petitioner.

OCTOBER 12, 1896.

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APPENDIX.

NATURE OF THE CONDITIONS PRECEDENT.

(Referred to in foot note on page 29, *supra*.)

It may be easily seen that the "conditions precedent" to a lawful delivery of the bonds are matters purely *in pais*.

The conditions precedent required by the Act, and the contract of subscription expressly authorized by it, were that the railroad "shall have been so completed through such county that a train of cars shall have passed over the same" *prior* to January 10, 1892.

Obviously two things were necessary; *first*, that the road should be completed *through* the county, and *second*, that a train of cars should pass over it *before* January 10, 1892.

We shall consider these requirements in reverse order.

I. The question whether or not a "train of cars had passed over" the road prior to a certain day, or at all, is clearly matter *in pais*. There was no effective way of making it a matter of record, and the Act does not so attempt.

The failure to send a train of cars over the line prior to January 10, 1892, would have been as fatal to the right of the railroad to demand the bonds as a failure to construct the road "through" the county. Evidently, if the bonds were to be "negotiable," some tribunal must have been established to ascertain and determine that question.

If the trustee was to ascertain and determine that fact, there is certainly nothing in the Act to justify the inference that he was not to decide as to the other fact. Was it designed that one part of the same condition, expressed in the same sentence, and inseparably connected by the very language of its creation, should be determined by the trustee, and the other part by "inspection" on the part of every purchaser of the bonds? The very suggestion seems absurd.

II. The question whether the road was completed to a given line of Mercer County is equally and clearly matter *in pais*.

It is indeed urged that the statutes fixing the boundaries of Mercer County are presumptively known to all persons.

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If that be conceded, it does not follow that the statutes, even if accurately defining the boundaries, would convey knowledge of the topography of the country; nor that the Legislative Act authorizing the issue of Mercer County bonds intended that every purchaser of those "negotiable" securities should visit Kentucky to see whether the railroad actually crossed two opposite lines of the county.

But the fact is that the statute defining the present south boundary of Mercer County, gives absolutely no certain indication of its location or direction. It was fixed by "An Act to establish the County of Boyle, and for other purposes," approved February 15, 1842.

The material sections are as follows:

"SECTION 1. *Be it enacted by the General Assembly of the Commonwealth of Kentucky*, That from and after the first day of March next all those parts of Mercer and Lincoln counties within the following boundaries to wit: beginning at the point where the Casey, Mercer, and Lincoln lines meet; thence running a direct line to *Shelby's meeting house*, in Lincoln County; thence in a direct line to the *five-mile tree* on the main road leading from Danville to Stanford; thence a direct line to the mouth of Street's branch in the Hanging Fork; thence with the mean-

ders of and down said fork to its mouth in Dick's River; thence down and with said river to a point thereon from which a due east and west line therefrom will include the *house, yard, and garden of the late Judge Boyle*, now owned and occupied by Robert Tilford, in Mercer County; thence from said point said due east and west line so as to include said house, yard, and garden; thence in a direct line to the *bridge across Harrod's Run*, on the turnpike road from Danville to Harrodsburg; thence to the *bridge across the Dry Fork* of Chaplin on the turnpike road from Perryville to Harrodsburg, and continuing the same course to the Washington County line; thence with the Washington and Marion east county lines to the north Casey line; thence with the Casey County line to the beginning, shall be, and the same is hereby, stricken from Mercer and Lincoln counties and erected into one distinct and separate county, to be called Boyle, in honor of Kentucky's distinguished jurist, John Boyle."

"SEC. 7. That the surveyor of Garrard County shall be, and he is hereby, appointed commissioner, with such assistants as he may deem necessary to employ, to run and mark the boundary lines of said county of Boyle, who shall be allowed three dollars per day for his services whilst engaged, and two dollars per day shall be allowed to each of the persons he may engage to assist him, payable out of the county levy of said county of Boyle."

It is to be observed:

First. That the Act recognizes that an actual *survey* is essential to fix the line, and that the

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surveyor of *Garrard* County is directed to make the survey.

Second. That the act points out no officer to whom the survey shall be returned; makes no provision for its record, nor gives any direction as to how the line shall be marked so that a person could find it.

Third. A person, by following the Act, could not now make a new survey for himself and thus determine the county line; the Act gives no calls or distances, and now, after fifty-five years, it can not be judicially presumed, that the "five mile tree," "Shelby's meeting house," "house, etc., of the late Judge Boyle," and the various "bridges" are still standing so that a person could locate the line required by the Act.

It must be presumed that in authorizing Mercer County to issue the bonds sued on herein, the Legislature had in mind the impossibility that any stranger, could locate the county line between Mercer and Boyle counties, and if it was the intention to require the Louisville Southern Railroad to be built to the county line, that difficulty afforded the most

conclusive reason for designating a specific tribunal authoritatively to determine the question.

A more fitting selection could not be made than an intelligent citizen of that county placed under bond "for a faithful discharge of his duty."